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In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

RUTH WALD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides that the "authorities * * * being exercised" with respect to a country on July 1, 1977, under Section 5(b) of the Trading With the Enemy Act may continue to be exercised with respect to that country thereafter. On July 1, 1977, Treasury Department regulations prohibited all unlicensed property transactions related to Cuba, and a general license authorized certain travel-related transactions involving Cuba. The question presented is whether, under Section 101(b), the President may narrow the terms of this general license and restrict travel-related property transactions involving Cuba.

PARTIES TO THE PROCEEDINGS

In addition to Donald Regan, Secretary of the Treasury, the following are also petitioners: John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations; Dennis M. O'Connell, Director, Office of Foreign Assets Control, Department of the Treasury; George P. Shultz, Secretary of State; and Ronald Wilson Reagan, President of the United States. In addition to Ruth Wald, the following are also respondents: Marian Lowe, Rosario Morales, Francis E. Bradley, Reverend Alice Hageman, Cuba Resources Group, Robert C. Howard, Center for Cuban Studies, and Linda Turner.

Intervening plaintiffs in the district court were Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion de Turistas Olimpicos de Puerto Rico (Atoprico), and other Puerto Rican sports fans. The intervening plaintiffs did not participate in the court of appeals.

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v.

RUTH WALD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury and the other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) and the memorandum of the court of appeals accompanying its order denying rehearing (App. B, *infra*, 15a-19a) are reported at 708 F.2d 794. The order of the district court denying a motion for preliminary injunction (App. E, *infra*, 22a-23a) and the magistrate's report recommending denial of the motion for preliminary injunction (App. F, *infra*, 24a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 21a) was entered on May 16, 1983. A timely petition for rehearing was denied on June 16, 1983 (App. C, *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reproduced in App. H, *infra*, 46a-56a.

STATEMENT

1. For many years the United States has not enjoyed cordial, normal relations with the Government of Cuba; and the management of relations with Cuba has posed some of the most difficult, sensitive and troublesome foreign policy problems presented to our government.[1] It is a longstanding objective of the United States to deter conduct by the Cuban Government that is inimical to foreign policy interests of the United States and its allies, particularly Cuban attempts to subvert and destabilize governments in Central America and the Caribbean region.[2] To

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[1]Declaration of Myles R.R. Frechette, Director, Office of Cuban Affairs, Department of State ¶ 4 (C.A.J.A. 103). A principal objective of the Cuban Government has been the overthrow of non-Communist governments in the western hemisphere and their replacement with regimes acceptable to Cuba. Declaration of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs ¶ 5 (Attachment E to Application for Stay). In particular, since 1978 Cuba, with the political, economic, and military support of the Soviet Union, has provided widespread support for armed violence and terrorism in the western hemisphere; in addition, Cuba maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. Frechette Declaration, *supra* ¶ 4 (C.A.J.A. 103).

The declaration of Mr. Frechette was submitted to the district court in connection with the government's response to respondents' motion for preliminary injunction. The declarations of Assistant Secretary Enders and other government officials, which update and expand declarations submitted to the district court, were filed in the court of appeals and in this Court in connection with the government's applications for stay of the mandate. We draw on these declarations in explaining the history and purpose of the Cuban embargo and the regulations at issue here. Copies of the declarations appear in either the joint appendix filed by the parties in the court of appeals or as attachments to our application for stay of mandate in this Court, filed June 23, 1983.

[2]Declaration of James H. Michel, Acting Assistant Secretary of State for Inter-American Affairs ¶ 3 (Attachment C to Application for

further this objective, the United States, in coordination with other countries in the western hemisphere,[3] imposed an extensive system of sanctions against the Cuban Government. A critical element in this system has, since 1963, been a wide-ranging embargo on trade and other economic transactions between Cuba and Cuban nationals, on the one hand, and persons subject to the jurisdiction of the United States, on the other.[4] The embargo has served to give the United States leverage over Cuban conduct.[5] By restricting Cuban access to hard currency, the embargo has also contributed to our nation's efforts to limit Cuba's ability to finance destabilizing activity in Central America and the Caribbean region and has dissociated the United States from such Cuban ventures.[6] Over the last 20 years, the President has adjusted the embargo on a number of occasions, through amendment of the Cuban Assets Control Regulations issued by the Department of the Treasury, 31 C.F.R. Part 515; the embargo has been used as a flexible instrument of foreign policy, sensitive to the particular state of relations between the United States and Cuba.[7]

2. The Executive has imposed the Cuban embargo pursuant to authority granted under the Trading With the Enemy Act of 1917 ("TWEA"), 50 U.S.C. App. (& Supp. V) 1 *et seq.* Prior to its amendment in 1977, Section 5(b) of the TWEA, 50 U.S.C. App. 5(b), gave the President, "[d]uring

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Stay); Enders Declaration, *supra* ¶ 5; Frechette Declaration, *supra*, ¶ 4 (C.A.J.A. 103).

[3]The United States acted in accord with, *inter alia*, Resolution VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs acting under the Inter-American Treaty of Reciprocal Assistance (Jan. 31, 1962) and Resolution I of the Ninth Meeting of Consultation of Ministers of Foreign Affairs (July 22, 1964), *reprinted in*, II *Inter-American Treaty of Reciprocal Assistance Applications, 1948-72*, at 77-78, 215-216 (General Secretariat, Organization of American States 1973). See *Zemel* v. *Rusk*, 381 U.S. 1, 14-15 & n.15 (1965).

[4]Enders Declaration, *supra* ¶ 6; Declaration of John M. Walker, Jr., Assistant Secretary of the Treasury for Enforcement and Operations, ¶ 3 (Attachment E to Application for Stay).

[5]Michel Declaration, *supra* ¶ 3.

[6]*Ibid.*; Walker Declaration, *supra* ¶ 3.

[7]See page 20 & note 32, *infra*.

the time of war or during any other period of national emergency declared by the President," broad authority:

> under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise [to]—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, * * *.[8]

In 1977 Congress enacted Pub. L. No. 95-223, 91 Stat. 1625, *et seq.* which amended the statutory scheme governing the President's exercise of emergency economic powers. Title I of Pub. L. No. 95-223, 91 Stat. 1625, amended the TWEA so as to confine to periods of war the President's broad TWEA authority to regulate transactions and property with respect to a foreign state or national; the effect was generally to withdraw the President's authority to exercise TWEA powers during peacetime periods of declared national emergency. Title II of Pub. L. No. 95-223, 91 Stat. 1626, known as the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. (Supp. V) 1701 *et seq.*, established a new statutory framework for the President's exercise of economic powers during periods of national emergency.[9] Under IEEPA, the President's authori-

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[8]Violation of regulations promulgated under the TWEA constitutes a felony punishable by imprisonment of not more than 10 years and/or a fine of not more than $50,000. 50 U.S.C. (Supp. V) App. 16. There are no civil penalties for violation of the regulations.

[9]IEEPA established new procedures for exercising emergency authorities. Under the TWEA, the existence of any declared emergency

ty to exercise economic powers during times of peace are limited to "deal[ing] with any unusual and extraordinary threat, which has its source * * * outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat." 50 U.S C. (Supp. V) 1701.[10]

However, Congress was careful to provide for continuation of presidential authority under Section 5(b) of the TWEA to exercise economic powers in connection with previously declared peacetime national emergencies. Congress expressly determined that the President should not be required to declare a *new* national emergency in order to continue an *existing* embargo; it decided that the President should be permitted to continue under the old statutory scheme the embargoes that were in effect at the time the new legislation was being considered. Thus, it included in Title I of Pub. L. No. 95-223, 91 Stat. 1625, a "grandfather

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was a sufficient predicate for exercise of any of the authorities provided under the Act. The National Emergencies Act, 50 U.S.C. 1601 *et seq.*, enacted in 1976, terminated all authorities possessed by the President as a result of existing national emergencies (except for authorities under Section 5(b) of the TWEA) and established new procedures governing the declaration of national emergencies. Under IEEPA, the President must declare a new national emergency with respect to a specific threat before initiating the exercise of emergency economic powers. 50 U.S.C. (Supp. V) 1701. In addition, the President must consult with Congress before and during the exercise of IEEPA authorities and report to Congress at the time he begins to exercise such authorities and every six months thereafter. 50 U.S.C. (Supp. V) 1703. Under both IEEPA and the National Emergencies Act, Congress purported to retain the power to terminate a declared national emergency and to cut off the use of emergency authorities by concurrent resolution. 50 U.S.C. (& Supp. V) 1622, 1706(b).

[10]With certain limitations not directly relevant here, the President has the same broad powers under the IEEPA that he had under the TWEA. See Staff of House Comm. on International Relations, 95th Cong., 1st Sess., *Markup on Revision of Trading With the Enemy Act* 4 (Comm. Print 1977) (statement of Rep. Bingham). (This committee print and other legislative materials relating to the 1977 amendment to the TWEA are reproduced in a Legislative History Appendix filed by the parties in the court of appeals.)

clause," which preserves the Section 5(b) authorities being exercised with respect to a country as of July 1, 1977. Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625, provides (emphasis added):

> [*T*]*he authorities conferred upon the President by section 5(b)* of the Trading With the Enemy Act *which were being exercised with respect to a country on July 1, 1977*, as a result of a national emergency declared by the President before such date, *may continue to be exercised with respect to such country*, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Pursuant to the grandfather clause, Presidents Carter and Reagan have in every year since 1978 determined that it is in the national interest to continue the exercise of TWEA authorities with respect to Cuba and certain other countries.[11]

3. Pursuant to the President's broad authority under Section 5(b) of the TWEA, *inter alia*, to "regulate * * * prevent or prohibit * * * any transfer * * * of * * * or transactions involving, any property in which any foreign country or a national thereof has any interest," the Cuban Assets Control Regulations have, since 1963, prohibited, "except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever, direct or indirect * * * [including] * * * [a]ll dealings in

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[11]See, *e.g.*, 47 Fed. Reg. 39797 (1982); 46 Fed. Reg. 45321 (1981); 45 Fed. Reg. 59549 (1980); 44 Fed. Reg. 53153 (1979); 43 Fed. Reg. 40449 (1978).

* * * any property * * * by any person subject to the jurisdiction of the United States * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963).[12] The effect of these regulations is to subject *all* property transactions related to Cuba to a comprehensive regulatory licensing regime. The regulations block all assets of Cuba or Cuban nationals; they prohibit persons subject to United States jurisdiction from engaging directly or indirectly in *unlicensed* commercial or other economic transactions of any kind with Cuba or Cuban nationals. The regulations provide that any regulation or license "may be amended, modified, or revoked at any time" (31 C.F.R. 515.805; 28 Fed. Reg. 6985 (1963)), and that "[a]ny transfer * * * which is in violation of any provision of this chapter or of any regulation * * * license or other direction or authorization * * * and involves any property in which a designated national has or has had an interest * * * is null and void * * *" (31 C.F.R. 515.203(a); 28 Fed. Reg. 6975 (1963)). *These regulations were in force on July 1, 1977, and continue in force today.*

Travel-related property transactions that inure to the benefit of Cuba or a Cuban national have been covered by the provisions of the Cuban Assets Control Regulations since 1963.[13] In March 1977, as part of President Carter's

[12]"Property" is defined to include, *inter alia*, "money, checks, drafts, * * * debts, indebtedness obligations, * * * contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent" (31 C.F.R. 515.311; 28 Fed. Reg. at 6977). "Transfer" is defined to include "any * * * transaction * * * whether or not done or performed within the United States, the purpose, intent, or effect of which is to * * * surrender, release, [or] transfer * * * any * * * interest with respect to any property * * * includ[ing] the making, execution, or delivery of any * * * check * * *" (31 C.F.R. 515.310; 28 Fed. Reg. at 6976-6977).

[13]The payment of funds directly to Cuba or Cuban nationals for meals, lodging or transportation represents the discharge of an indebtedness for goods or services provided and thus is a transaction with respect to property in which Cuba has an interest, as is payment of funds to non-Cuban entities (*e.g.*, an airline) that in turn remit proceeds to Cuba or pay fees to Cuba. Since imposition of the Cuban embargo in 1963 the Treasury Department has viewed the broad prohibition set

efforts to improve relations with Cuba, the Department of the Treasury promulgated 31 C.F.R. 515.560 (1977), 42 Fed. Reg. 16621 (1977),[14] which constituted a general license authorizing many financial transactions incident to travel to and within Cuba. Under this license persons who visited Cuba were authorized to pay for their transportation and maintenance expenses (*e.g.*, meals, hotel bills, taxis) while in Cuba. They were, however, not permitted to buy and bring back to the United States more than $100 worth of Cuban goods for personal use. 31 C.F.R. 515.560(a)(3) (1977). The regulations expressly prohibited domestic credit card issuers from entering into contracts with Cuban enterprises for issuing credit to travelers. 31 C.F.R. 515.560(a)(7) (1977).

In late 1981, it became apparent to the United States that the Cuban Government was increasing its efforts to destabilize Central American governments and at the same time was initiating a program to increase its hard currency earnings through expansion of its tourism industry, particularly by attracting tourists from the United States.[15] In May 1982, in order to "reduce Cuba's hard currency earn-

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out in 31 C.F.R. 515.201 as applying to travel-related property transactions involving Cuba. See page 16 & note 26, *infra*.

[14]31 C.F.R. 515.560(a) (1977) provided in part:

> The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.
>
> (2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.
>
> (3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

[15]Michel Declaration, *supra* ¶ 6. For example, the Director for United States Affairs of the Cuban National and International Tourist Enterprise had requested visas for December 1981 and January 1982 visits to New York and Miami to meet 30 to 40 American travel agents for the purpose of promoting tourism to Cuba. In addition, the American Society of Travel Agents had inquired on behalf of Cuba whether Cuba could present an exhibition promoting travel to Cuba at the Society's 52nd World Travel Congress in Miami, October 10-16, 1982. Fol-

ings from travel by United States persons to and within Cuba," the Department of the Treasury amended 31 C.F.R. 515.560 to modify the general license for travel-related financial transactions involving Cuba. 47 Fed. Reg. 17030 (1982).[16] It is this modification that is at issue here. As amended, Section 515.560 provides that the general license to engage in travel-related transactions is limited to persons engaged in official travel, visits to close relatives, travel completely hosted by Cuba (*i.e.*, travel that does not involve economic benefit to Cuba), and travel related to news-gathering, professional research, or similar activities. The amended regulation also provides that specific licenses may be granted in the case of travel for humanitarian reasons or for purposes of public performances in Cuba in connection with cultural or sports events. The general effect of the amendments was to rescind those portions of the 1977 general license that authorized transactions incident to business and tourist travel.

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lowing the 1977 relaxation of licensing for travel-related financial transactions Cuba began to develop plans for a tourist complex on Cayo Largo, and possibly on two other cays, offering gambling casinos and other special attractions. A 1981-1985 five year plan called for inaugurating 22 new hotels with 2,800 rooms and recovering or improving an additional 6,900 rooms. By legislative decree, joint ventures with foreign ownership were authorized in order to attract foreign hard currency investments, primarily in tourist-related projects. See Enders Declaration, *supra* ¶ 8.

Reestablishment of a vigorous tourism industry could provide Cuba with a significant source of hard currency it could use to further its foreign policy goals. In 1958 Cuba earned $37 million from United States travelers alone, or two percent of its gross national product and almost four percent of foreign exchange earnings (Enders Declaration, *supra* ¶ 10). United States government estimates indicated that if Cuba could return tourism to its 1958 prominence as a source of foreign exchange, within a few years it would earn a net hard currency income of approximately $190 to $225 million per year, which would amount to 20% of Cuba's annual hard currency income under present conditions (Walker Declaration, *supra* ¶ 4).

[16] In July 1982, 31 C.F.R. 515.560 was further amended to clarify the scope of the general and specific licenses and the meaning of certain terms. 47 Fed. Reg. 32060 (1982).

4. a. In June 1982, respondents, who are individuals and groups interested in travel to Cuba, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[17] Respondents claimed that the restrictions on travel-related financial transactions imposed by the May 1982 amendment to 31 C.F.R. 515.560 violated 22 U.S.C. (Supp. V) 211a, which prohibits area restrictions on passports except in certain circumstances; exceeded the authority conferred by Section 5(b) of the TWEA and by IEEPA; had not been promulgated pursuant to IEEPA procedures; and violated respondents' First Amendment and due process rights, including their right to travel.

Respondents' request for preliminary injunctive relief was referred to a magistrate. Following briefing and argument, the magistrate recommended denial of a preliminary injunction (App. F, *infra*, 24a-44a). He concluded that in enacting the grandfather clause in Pub. L. No. 95-223, Congress did not intend to freeze in place the specific regulations that happened to be in effect on July 1, 1977 (App. F, *infra*, 36a). Because transactions related to Cuban travel were being regulated on that date (albeit by a regulation authorizing most such transactions by general license), the magistrate concluded that the President had the authority in 1982 to change the extent of that regulation (*ibid.*). The magistrate found that the legislative history supported this construction of the grandfather clause and that the Executive, which was charged with enforcing the TWEA, had construed the clause in a similar manner (*id.* at 36a-39a). Finally, he concluded that an injunction against enforcement of the regulation would cause irreparable injury to the government's conduct of its foreign affairs and that that injury outweighed any inconvenience to respondents re-

[17]One respondent, the Center for Cuban Studies, applied to the Office of Foreign Assets Control of the Department of the Treasury for a license to engage in travel-related financial transactions. That application was denied. See C.A.J.A. 38. Although the other respondents did not apply for licenses, it does not appear from their allegations below that they would qualify either under the general license or for a specific license under the terms of 31 C.F.R. 515.560.

sulting from postponement of their planned travel (*id.* at 40a-42a).

On July 22, 1982, after considering written and oral objections to the magistrate's report, the district court denied the motion for a preliminary injunction (App. E, *infra*, 22a-23a). The district court concluded that respondents were not likely to succeed on the merits of either their statutory or their constitutional claims.[18]

b. The court of appeals vacated the district court's order and remanded with instructions to issue a preliminary injunction against enforcement of 31 C.F.R. 515.560 (App. A, *infra*, 1a-14a). The court of appeals concluded that the grandfather clause did not authorize the 1982 amendment to the regulation, that the government had failed to follow the IEEPA procedures in amending the regulation, and that the amended regulation is therefore invalid. The court declined to reach respondents' other statutory and constitutional contentions.

In concluding that the grandfather clause did not authorize the 1982 amendment to 31 C.F.R. 515.560, the court of appeals relied on its finding that on July 1, 1977, the Treasury Department was "*not* restricting *travel* to Cuba" (App. A, *infra*, 4a). The court recognized that on that date the government was restricting commodity purchases involving Cuba, but concluded that restriction of travel-related transactions was a "very different 'exercise[ ]' of authority" (*id.* at 5a), had been treated differently from commercial restrictions in the past (*id.* at 5a-7a), and, unlike commercial regulations, raised special constitutional concerns (*id.* at 7a).

The court of appeals cited various passages from the legislative history to support its conclusion that Congress intended the grandfather clause to be narrowly construed (App. A, *infra*, 7a-10a). It found further support for its reading of the statute in this Court's directives to lower

[18]During the course of the district court proceedings, respondent Francis E. Bradley obtained a temporary restraining order permitting him to travel to Cuba pending a hearing on the motion for preliminary injunction. See App. G, *infra*, 45a.

courts to construe narrowly all delegated powers that curtail the right to travel (*id.* at 11a-12a). The court concluded finally that its construction of the grandfather clause would not prevent the President from regulating travel-related financial transactions, since it could use the IEEPA procedures to do so (*id.* at 12a), and that a narrow construction of the grandfather clause would be consistent with Congress's overall intent to "impos[e] Congressional limits upon the President's restrictive powers" (*id.* at 12a-13a).

The court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc, as well as its request for stay of the mandate (Apps. B and C, *infra*, 15a-20a). On July 6, 1983, this Court granted a stay of the court of appeals' mandate pending the timely filing and disposition of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated an important component of the Cuban Assets Control Program. Under that program, the Executive employs TWEA authority to regulate financial and property transactions with Cuba as one element in the management of our delicate and difficult relations with the Cuban Government. The court of appeals has held that that authority cannot be used to restrict travel-related transactions involving Cuba. Its holding is based on a wooden and cramped construction of the governing statute, one that will impair the conduct of United States foreign policy and that is inconsistent with congressional intent. The decision below therefore warrants review by this Court.[19]

1. The United States' wide-ranging Cuban embargo, which subjects transactions involving Cuba to government supervision and regulation and which operates, where necessary, to deny Cuba hard currency, is a fundamental element of United States foreign policy.[20] The decision of the

[19]Although the court of appeals remanded for issuance of a preliminary injunction, its opinion on the merits makes clear that it believed issuance of a permanent injunction would be warranted as well. Thus, the case is ripe for review by this Court at this stage.

[20]Michel Declaration, *supra* ¶ 3.

court of appeals, which declares invalid the Executive's adjustment of that embargo with respect to one subject—transactions related to tourist and business travel—gives Cuba the opportunity to earn substantial sums of hard currency that it can use to advance activities inimical to the interests of the United States.[21] More important, the court of appeals' decision casts doubt on other significant post-1977 changes in both the Cuban Assets Control Program and other critical foreign assets control programs still operating under TWEA authority (including embargoes against North Korea, Vietnam, and Cambodia (Kampuchea)).[22] The Section 5(b) authorities on which the Treasury Department relied in amending the regulation at issue in this case are the same authorities used to effect a variety of adjustments to the Cuban embargo and the other foreign assets control programs. Thus, the decision below could be invoked in support of efforts to strike down a host of other important post-1977 amendments to these programs.[23] This is not an idle concern. The Eleventh Circuit recently relied on the decision below as a basis for holding invalid 31 C.F.R. 515.415(a), a regulation that was promulgated during the Mariel boatlift (or "freedom flotilla") of Cuban refugees and that makes clear that 31 C.F.R. 515.201, the general prohibition on transactions with Cuba, covers the transportation to the United States of Cuban nationals without visas. *United States* v. *Frade*, 709 F.2d 1387, 1397-1401 (1983), petition for rehearing filed Sept. 2, 1983. If left unreviewed, the decision below could interfere

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[21] As we indicated in our Application for Stay (at 15-16), the Treasury Department is aware of several instances in which tour groups have announced plans for trips to Cuba following the decision below. See Declaration of John M. Walker, Jr. ¶ 3 and Tabs A and B (Attachment D to Application for Stay). In addition, the decision below will encourage Cuba to move quickly to develop its tourism industry. Michel Declaration, *supra* ¶ 7; Enders Declaration, *supra* ¶ 15.

[22] As of July 1, 1977, the United States was maintaining comprehensive trade embargoes against Cuba, North Korea, Vietnam, and Cambodia (Kampuchea) under the authority of Section 5(b) of the TWEA.

[23] See pages 20-21, note 33, *infra*, for a description of post-July 1977 amendments to the Cuban Assets Control Regulations.

significantly with the government's ability to enforce any post-1977 change in regulations promulgated under grandfathered TWEA authority.[24]

The decision below substantially limits the President's foreign policy options with respect to Cuba and the other countries that continue to be the subject of regulation under Section 5(b) of the TWEA. It casts doubt on the Executive's ability to exercise TWEA authorities with respect to Cuba, North Korea, Vietnam, and Cambodia (Kampuchea) in a manner that is flexible and sensitive to the needs of the diplomatic situation at any particular time. In the past Cuba had to consider the Executive's unquestioned ability to respond to Cuban misconduct swiftly and flexibly through the use of TWEA authorities.[25] But today the President cannot be sure that adjustments to the terms of an ongoing embargo will be upheld by the courts. Ultimately the effect of the decision below is to deprive the President of a "flexible and long-standing foreign policy instrument" (Michel Declaration, *supra* ¶ 10).

The court of appeals indicated rather casually (App. A, *infra*, 12a) that the regulation it invalidated in this case could be repromulgated pursuant to IEEPA. But action under IEEPA requires the President to declare a new national emergency based on a finding that Cuba presents an "unusual and extraordinary threat" to the "national security, foreign policy or economy" of the United States. Such a step could have grave foreign policy implications. Michel Declaration, *supra*, ¶ 9. Declaring a national emergency and finding an "unusual and extraordinary threat" may be

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[24]Since the decision below was issued, various individuals and organizations have notified the Treasury Department of their belief that they are no longer bound by certain provisions of the Cuban Assets Control Regulations. See Walker Declaration, *supra* ¶¶ 4, 6-7, and Tab C; Michel Declaration, *supra* ¶ 7.

[25]Michel Declaration, *supra* ¶¶ 3, 5 (ability of the President to act under TWEA has been "a fact of independent foreign policy significance" and a "central source of leverage the United States has over Cuba"). Cuba may well perceive that the entire Cuban Assets Control Program has been placed in jeopardy, which could affect its response to foreign policy initiatives by the United States. Michel Declaration, *supra* ¶¶ 7, 8, 10.

appropriate as a basis for initial implementation of an assets control program (see page 22, *infra*); but the President may well conclude that these steps could needlessly heighten tensions and adversely affect United States foreign policy interests if used in connection with a mere modification of an existing program. Moreover, use of IEEPA in connection with adjustments to grandfathered embargoes would impose additional procedural burdens on the Executive's conduct of foreign policy and would initiate a two-track system of regulation in connection with the pre-1977 embargoes. Further, if the President were now to act under IEEPA, this would presumably render moot any challenge to what we believe to be an erroneous reading of the grandfather clause. It seems to us inappropriate to force the President to choose between acting under IEEPA (and incurring these grave consequences), on the one hand, and inaction (that is, forgoing adjustments to a grandfathered embargo he otherwise would make), on the other, in the absence of a definitive ruling by this Court that Congress intended to impose such a choice.

2. The decision below is erroneous. The court of appeals gave the grandfather clause an exceedingly narrow construction by reading it to preserve only the precise prohibitions that happened to be in place on July 1, 1977. That construction is inconsistent with the language of the governing statute, with the traditional flexibility granted to the Executive in conducting foreign assets control programs, and with the legislative history that casts light on Congress' purpose in preserving the exercise of certain existing authorities through the grandfather clause.

a. The starting point in construing a statute is the language of the statute itself. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The grandfather clause provides that "the authorities conferred upon the President by section 5(b) of the [TWEA], which were being exercised with respect to a country on July 1, 1977, * * * may continue to be exercised with respect to such country * * *." Pub. L. No. 95-223, Section 101(b), 91 Stat. 1625.

The authorities "being exercised" with respect to Cuba

on July 1, 1977, plainly encompassed the *authority* to impose restrictions on travel-related transactions. On that date, the Cuban Assets Control Regulations prohibited—as they had since 1963—"except as specifically authorized by the Secretary of the Treasury * * * transactions involv[ing] property in which [Cuba] has * * * any interest of any nature whatsoever direct or indirect * * * by any person subject to the jurisdiction of the United States * * *." 31 C.F.R. 515.201(b); 28 Fed. Reg. 6975 (1963). That prohibition was an exercise of the Executive's broad Section 5(b) authority, *inter alia*, to "regulate * * * prevent or prohibit" property transactions with foreign governments and foreign nationals. Its effect was to impose a comprehensive regulatory system—an all-encompassing embargo—on trade and property transactions between the United States and Cuba. The broad prohibition of Section 515.201 encompasses all sorts of commercial and financial transactions with Cuba or Cuban nationals (*e.g.*, payment for Cuban cigars or sugar), including travel-related transactions (*e.g.*, payment for Cuban hotel rooms), and has been so interpreted and applied since 1963.[26] Since the authority to control such transactions was "being exercised" on July 1, 1977, by virtue of Section 515.201, it was encompassed within the Section 5(b) authorities grandfathered under Section 101(b) of Pub. L. No. 95-223.

It is true that in March 1977 restrictions on travel-related financial transactions were eased. But the tempo-

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[26]See the broad definitions of "property," "interest in property," and "transfer" contained in the regulations. 31 C.F.R. 515.310, 515.311. And see page 7, note 13, *supra*. Since 1963, the Department of the Treasury has interpreted Section 515.201 to include a prohibition on travel-related financial transactions. The Department has sought to enforce the prohibition by investigating persons known to have traveled to Cuba, by sending questionnaires to United States businesses with foreign subsidiaries conducting licensed trade with Cuba, and by sending letters to various travel magazines, travel agencies, airlines and individuals warning them of the controls and license requirements. See *United States-Cuba Trade Promotion: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 44-46 (1976) (statement of Stanley Sommerfield, Acting Director, Office of Foreign Assets Control, Dep't of the Treasury).

rary loosening of those restrictions—through a regulation granting a general license to engage in certain travel-related transactions—itself constituted an *exercise* of the Executive's Section 5(b) authority, "by means of * * * licenses, or otherwise," to regulate *all* property transactions with Cuba. That authority has been *continuously* asserted from 1963 to 1983, in the form of the general prohibition (in Section 515.201 of the regulations) of all unlicensed property transactions. The 1977 general license in effect granted a temporary permission, needed to overcome the general prohibition—temporary because expressly and at all times subject to amendment, modification, or revocation (see 31 C.F.R. 515.805 (1977)).[27] (In fact, the permission was itself subject to exceptions even in the 1977-1982 period.[28]) Then, in 1982, the permission was in turn narrowed to apply only to transactions connected with travel for purposes of newsgathering, research, family visits, etc. In sum, the authority broadly to regulate *all* property transactions involving Cuba and Cuban nationals—including the purchase of Cuban hotel rooms as well as the purchase of Cuban sugar—has been continuously exercised ever since 1963, was in fact being exercised on July 1, 1977, and has continued to be exercised ever since.[29]

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[27]As this Court has noted, significant conditions can be imposed in connection with expressly revocable licenses. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673, 674 n.6 (1981) (President had authority to withdraw general license permitting legal actions against Iran, even to the extent of nullifying court orders of attachment issued while such license was in effect). See also *Orvis* v. *Brownell*, 345 U.S. 183 (1953).

[28]Under 31 C.F.R. 515.560 (a)(3) (1977), travelers were authorized to bring back no more than $100 from Cuba (for personal use only). Under 31 C.F.R. 515.560(a)(5) (1977), only transactions involving nonscheduled flights and voyages to, from, and within Cuba were authorized. 31 C.F.R. 515.560(a)(7) (1977) expressly excluded domestic credit card issuers from contracts with Cuban enterprises for extension of credit to travelers.

[29]The legislative history indicates that Congress understood that authority with respect to travel-related financial transactions was being exercised at the time the grandfather clause was being considered. For example, when Leonard Santos, an Administration representative, was asked to list the authorities being exercised with respect to Cuba and Vietnam, he replied that they "would involve the travel to those

The court of appeals' narrow and rigid reading of the grandfather clause disaggregates the authorities being exercised under it into arbitrary compartments in a manner that is wholly inconsistent with the flexibility needed for an effective diplomatic strategy. In the court's view, since many travel-related financial transactions were authorized under the general license established by Section 515.560 of the regulations as of July 1, 1977, the grandfather clause does not permit retightening of the restrictions through modification of the general license. But the grandfather clause does *not* say that only the specific prohibitions on the books on July 1, 1977, may remain in effect; instead, it speaks broadly about preserving the "authorities conferred upon the President by section 5(b)." Section 5(b) itself does not include any specific reference to travel-related financial transactions, but instead gives the President broad power to regulate, prohibit or permit a wide variety of transactions in various circumstances.

There is no indication whatever in the language or structure of these statutes that Congress believed that authority to regulate the purchase of Cuban hotel rooms, restaurant meals, and airline tickets constituted a separate and independent category of authority, to be isolated from the President's authority to regulate other purchases and property transactions. Congress could easily have said, had it wished to do so, that only "existing regulations" or "existing prohibitions" may remain in effect. But it did not do so. It preserved the "authorities * * * being exercised" on July 1, 1977. Since the authority to regulate all property transactions with Cuba was plainly being exercised on that date, it is that authority that was preserved by the grandfather clause.

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countries and the exchange of goods." *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 215 (1977) ("*House Subcommittee Hearings*"). Santos also informed the subcommittee that "all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *Id.* at 188.

b. The court of appeals also failed to recognize the traditional manner in which foreign assets control programs have been conducted and thus disregarded an important part of the context in which Congress acted in grandfathering TWEA authority. Congress' primary purpose in enacting the grandfather clause was to leave undisturbed on-going embargo programs. See pages 23-24, *infra*. As this Court has recognized, the success of those programs requires broad authority and flexibility in administration, so that they can be adjusted to the diplomatic situation as it changes. See *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 672; *Propper* v. *Clark*, 337 U.S. 472, 493 (1949).[30] The court of appeals' interpretation of the grandfather clause makes it a rigid and unworkable instrument, keyed to the happenstance of that situation as it stood at one moment in 1977.

Experience shows that United States policy with respect to transactions involving property of a foreign country subject to an assets control or embargo program cannot be frozen into place; these programs operate as on-going systems that are components of an on-going foreign policy and that should not be visualized as a static list of specific prohibitions. See, *e.g.*, *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 662-666; *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833, 839-841 (D.C. Cir. 1970).[31] Thus, between its 1963 in-

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[30]This Court has indicated that both the legislative history of the TWEA and the cases interpreting it "fully sustain the broad authority of the Executive when acting under this congressional grant of power." *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 672. The purpose of the TWEA is to permit the Executive to exercise full control over any property or transaction in which a foreign government or national has an interest. *Propper* v. *Clark*, *supra*, 337 U.S. at 493. See also *Zittman* v. *McGrath*, 341 U.S. 446, 448, 463-464 (1951); *Lyon* v. *Singer*, 339 U.S. 841 (1950). Thus, the TWEA authorities granted by Congress have been construed broadly to preserve the Executive's flexibility. *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952); *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-489 (1947); *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 110 (2d Cir.), cert. denied, 385 U.S. 898 (1966).

[31]Experience with the Iranian assets control program illustrates the sorts of adjustments that may be necessary. After Iranian assets were

ception and July 1, 1977, the Cuban Assets Control Program had itself undergone considerable change.[32] Congress can be presumed to have been aware of this history of regulatory adjustment (see *Haig* v. *Agee*, 453 U.S. 280, 300 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)); and there is no indication that it intended to eliminate the flexibility that obviously was necessary to the continuing effectiveness of existing programs. The Executive has understood Congress' intent in these terms, and, as might be expected, the foreign assets control programs that existed on July 1, 1977, have continued to evolve since that date.[33] Indeed, the 1982 retightening of restrictions on travel-related financial transactions, following the 1977 liberaliza-

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blocked, a general license authorized attachments of such property. That license was subsequently revoked, and the attachments obtained under the license rendered invalid. See *Dames & Moore* v. *Regan*, *supra*.

[32]For example, the embargo on trade with Cuba was initiated in 1962 under the narrow authority of the Foreign Assistance Act of 1961, 22 U.S.C. 2370(a). Following the 1963 Cuban missile crisis, the President tightened the embargo by exercising TWEA authority to regulate imports from third countries of goods manufactured from Cuban raw materials and trade between Cuba and Americans or American-owned subsidiaries in foreign countries. 28 Fed. Reg. 6975 (1963). In 1964, the regulations were amended to provide for the taking of a census of Cuban blocked assets in the United States (31 C.F.R. 515.607, 515.608; 29 Fed. Reg. 1617, 1619). In 1974, the regulations were amended to clarify the prohibition preventing United States persons from dealing abroad in Cuban-origin merchandise (31 C.F.R. 515.410) and to provide, *inter alia*, for issuance of specific licenses for importation of goods taken out of Cuba prior to July 8, 1963 (31 C.F.R. 515.543), for Cuban-origin goods sent as gifts (31 C.F.R. 515.544), for Cuban-origin books, films, tapes, news materials, and research samples (31 C.F.R. 515.545, 515.546, 515.547), and for payments to Cuba for overflights and emergency landings (31 C.F.R. 515.548). See 39 Fed. Reg. 25317, 25318, 25319, 28434 (1974). In 1975, the regulations were amended to provide for licenses for certain categories of transactions between Cuba and United States-owned or controlled firms in third countries (31 C.F.R. 515.559; 40 Fed. Reg. 47108).

[33]In addition to the regulation under challenge in this case, there have been a number of post-July 1977 changes to the Cuban Assets Control Regulations. In 1978, the regulations were amended to authorize quarterly remittances to Cuba of funds from non-blocked accounts

tion (which occurred only a few months before July 1, 1977), is characteristic of the sort of adjustment necessary to keep an assets control program consistent with our nation's foreign policy needs.[34]

The programs authorized by the TWEA are intimately connected to the national security and the conduct of foreign policy. The grandfather clause, preserving authorities under the TWEA, should be construed consistently with the strong tradition recognizing the Executive's inherent authority and need for flexibility in this area. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *Curran* v. *Laird*, 420 F.2d 122, 128-133 (D.C. Cir. 1969); cf. *E.W. Bliss Co.* v. *United States*, 248 U.S. 37, 46 (1918). Indeed, because the grandfather clause implicates the Executive's responsibility under the Constitution to conduct foreign affairs, the courts "Should hesitate long before limiting or embarrassing such powers." *MacKenzie* v. *Hare*, 239 U.S. 299, 311 (1915). In the absence of convincing evidence to

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for family support purposes, to authorize travel-related transactions of Cuban nationals with United States visas, and to allow United States travel agents or sponsors of exhibitions or performances to arrange or assist in such travel transactions, and to authorize transactions in connection with public exhibitions or performances in the United States by visiting Cuban nationals (31 C.F.R. 515.563, 515.564, 515.565; 43 Fed. Reg. 19852). In 1979, a new regulation imposed an interest payment requirement on holders of certain types of blocked Cuban property (31 C.F.R. 515.205; 44 Fed. Reg. 11770). In 1980, the regulations were amended to add a provision clarifying the application of the regulations to the Mariel boatlift (31 C.F.R. 515.415) and provisions authorizing transactions incidental to satellite communications for purposes of news coverage and authorizing licenses on a case-by-case basis for transactions incidental to other communications activities, such as the provision of telephone and telegraph services between the United States and Cuba (31 C.F.R. 515.542; 45 Fed. Reg. 58843).

[34]It will not do to suggest that the grandfather clause permits relaxation of restrictions on transactions, but does not allow tightening of an embargo without the declaration of a new national emergency. The broad TWEA authorities that are preserved under the grandfather clause should not operate on a one-way ratchet. If Congress intended to give the President the flexibility to relax the embargo in the interests of United States foreign policy, it must also have intended that he be able to impose restrictions if he determines that such a step would further United States foreign policy interests.

the contrary, it is appropriate to conclude that Congress did not intend to deprive the Executive of the flexibility to make necessary adjustments to the Cuban Assets Control Program.

The court below suggested that, if the President wished to make changes in assets control programs existing on July 1, 1977, Congress intended that he use the new IEEPA procedures. See App. A, *infra*, 12a. But there is no indication that Congress wished to create a two-track system, under which some regulations involving Cuba (*e.g.*, those addressed to importing Cuban cigars or sugar) would exist under grandfathered TWEA authority, while others (*e.g.*, those addressed to buying Cuban hotel space) would be covered by new IEEPA authority. Such a construction of the statute would require the President, when he wished to tighten an existing embargo, to take the major step of declaring a new national emergency with respect to an "unusual and extraordinary threat * * * to the national security, foreign policy, or economy of the United States". Requiring such a formidable and sensitive step to be taken in connection with an adjustment to an existing program makes little sense and would limit significantly the President's flexibility in conducting foreign policy.[35] Indeed, as

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[35]See Michel Declaration, *supra* ¶ 9 (noting that invocation of IEEPA procedures would have significant foreign policy implications).

The scheme Congress established under IEEPA itself suggests that the court of appeals erred in construing the grandfather clause. Under IEEPA, the President must declare a national emergency with respect to a particular threat at the *outset* of a foreign assets control program. However, once the President has taken that major step, that declaration then serves as the predicate for an ongoing system of regulation, so that the Executive may issue and amend regulations with respect to the same threat without declaring a new national emergency. Rather than requiring a declaration of emergency in connection with the grandfathered TWEA authority, Congress settled for an annual declaration that exercise of such authorities with respect to a specific country was in the national interest. In view of the latter requirement, there is little reason to believe Congress also would have required declaration of a new national emergency in connection with modification of regulations issued under TWEA authority, particularly when it did not require such a declaration in connection with similar changes in IEEPA regulations.

we now show, it was Congress' desire to avoid this very result that led it to enact the grandfather clause.

c. The legislative history of the grandfather clause, read as a whole, indicates that Congress intended to preserve the Executive's flexibility with respect to regulation of transactions involving those countries for which an embargo was in effect on July 1, 1977. The Senate Report makes clear the breadth of the authority reserved to the President under the grandfather clause: "Section 101(b) would enable the President to continue to *control transactions* with certain countries (Cuba and Vietnam, for example) * * *." S. Rep. No. 95-466, 95th Cong., 1st Sess. 4 (1977) (emphasis added). The House Report recognizes that the comprehensive Cuban embargo itself was an "exercise" or "use" of Section 5(b) authorities that was in effect on July 1, 1977, and that it therefore would be preserved under the grandfather clause. H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 9, 12 (1977). Many of those who spoke during congressional consideration of the grandfather clause indicated that they understood that it was the existing embargoes against particular countries that were being grandfathered. For example, during the House debates, Representative Bingham (chairman of the subcommittee responsible for the legislation) explained:

> [T]his legislation specifically grandfathers the embargoes against Vietnam, Cambodia, Laos, Cuba, and other existing embargoes, so that they are not affected in any way by this legislation.

123 Cong. Rec. 38166 (1977).[36] On signing the legislation, President Carter likewise made the point that it would not affect "embargoes now being exercised against certain countries." 13 Weekly Comp. Pres. Doc. 1940, 1941 (Dec. 28, 1977).

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[36] See also, *e.g.*, *House Subcommittee Hearings*, *supra*, at 188, 193, 207, 210; *Markup on Revision of Trading With the Enemy Act*, *supra*, at 2, 7; S. Rep. No. 95-466, *supra*, at 4; 123 Cong. Reg. 22475 (1977) (statement of Representative Bingham, referring to continuation in effect, at the President's discretion, of "trade embargoes and asset control programs currently applied by the United States under the authority of section 5(b)").

The debate in Congress did not focus on the substance of specific regulations in effect on July 1, 1977, as it presumably would have if Congress had intended to freeze those regulations in place. Rather, debate focused on whether existing embargoes should be terminated or allowed to continue. Congress recognized that it would be inappropriate for the President to have to declare a new national emergency in connection with an existing embargo. As the court below noted (App. A, *infra*, 10a), the legislators were sensitive to the Executive's negotiating needs:

> To have required the President to announce publicly a *new declaration* of emergency in order to continue an *existing embargo* would have required him to undertake a political act with international political impact. The result, as described by Prof. Lowenfeld before the subcommittee, might have been an "inappropriate interference in negotiations being carried out by the Executive Branch * * *." [*House Subcommittee Hearings*,] *supra*, at 19.

See also, *e.g.*, *House Subcommittee Hearings*, *supra*, at 207 (statement of Rep. Bingham) (noting that the subcommittee had recognized that it "might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam"); *id.* at 209 (statement of R. Roger Majak, subcommittee staff director) ("The prospect of the President having to declare a new emergency with respect to some of these existing uses, such as Cuba, * * * does pose a diplomatic, or potential diplomatic problem"); *id.* at 190 (statement of Rep. Bingham) ("I personally would not argue that we would ask or expect the President to declare, for the first time, an emergency with respect to Cuba."); *id.* at 103 (testimony of Assistant Secretary of the Treasury C. Fred Bergsten); *id.* at 182 (testimony of Leonard Santos). Ultimately, Congress enacted the grandfather clause because it recognized that continuation of existing uses of Section 5(b) authorities was "important for the continued day-to-day functioning of the Government" (H.R. Rep. No. 95-459, *supra*, at 6-7) and that the legislation should avoid getting into the merits of ex-

isting embargo programs. See, *e.g.*, *House Subcommittee Hearings*, *supra*, at 210 (remarks of Rep. Bingham).

In support of its narrow construction of the grandfather clause the court of appeals relied on isolated and, at best, ambiguous statements by some legislators. In particular, the court considered references in the legislative history to "existing uses" of TWEA authorities as indicating a desire to grandfather only the specific prohibitions in effect on July 1, 1977. See App. A, *infra*, 7a-9a. But the court pointed to nothing in the legislative history that defines the "existing uses," and, in view of other portions of the legislative history, that phrase is more appropriately read to refer to the existing embargoes against specific countries, as the House and Senate reports suggest.[37] Indeed, the court itself acknowledged that it could "understand how others could reasonably conclude that the legislative history is ambiguous and should be read differently" from the manner in which the court had construed it (App. B, *infra*, 19a). We submit that in fact the legislative history points to the conclusion that Congress wished to avoid requiring the President to declare a new national emergency in connection with an existing embargo and that it did not intend to cut back on the President's flexibility to make adjustments of the type at issue in this case.

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[37]The court of appeals also relied on the deletion from the proposed grandfather clause of language stating that "any other authority conferred upon the President by [Section 5(b)] may be exercised to deal with the same set of circumstances" and Representative Bingham's statements about that deletion. See App. A, *infra*, 9a-10a. The deletion may have resulted from a concern that the language could have been used to extend embargoes to countries that were not then subject to a comprehensive embargo. See *House Subcommittee Hearings*, *supra*, at 211-212. The Administration was not concerned about the deletion because it was of the view that where there was already an embargo "all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised." *House Subcommittee Hearings*, *supra*, at 188 (remarks of Leonard Santos). Indeed, Representative Bingham himself confirmed this understanding when, subsequent to his statements about the deleted language, he noted with respect to the embargo against Cuba that "[i]t is not the intention in this draft to interfere with that." *Id.* at 188. See also *id.* at 207.

d. The court of appeals supported its restrictive construction of the grandfather clause in part by reference to this Court's statements about the constitutional protection afforded to travel and to 22 U.S.C. (Supp. V) 211a, under which Congress limited the Secretary of State's authority to impose area restrictions on United States passports. We believe the court of appeals' analysis in this respect was faulty.

The challenged regulation does not limit the right to travel as such; it regulates only transactions involving transfer of money or other economic benefits to Cuba, such as payment for a hotel room or an airline ticket. The purpose of the regulation is not to prevent travel but to deny hard currency to Cuba and to head off Cuban plans to develop a lucrative tourism industry that would generate hard currency that in turn could be used for purposes detrimental to the interests of the United States. See pages 8-9, *supra*. The regulation is part of a broad program under which many different sorts of transactions that would result in economic benefit to Cuba are prohibited unless authorized by the Secretary of the Treasury. Moreover, the challenged regulation does not have the effect of cutting off all travel to Cuba; rather, it affects primarily transactions incident to tourist and business travel. Under the regulation, journalists, professional researchers, close family members, those whose travel expenses are paid for entirely by Cuba, artists and athletes, and various other categories of individuals are permitted to engage in travel-related transactions pursuant to general or specific licenses.

To the extent the challenged regulation limits the exercise of a constitutional right to travel, that limitation is restricted to a single country and constitutes an incidental and permissible effect of a valid restriction on property transactions based on considerations of national defense and foreign relations. See, *e.g.*, *Haig* v. *Agee*, *supra*, 453 U.S. at 306-310; *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); *Brown* v. *Glines*, 444 U.S. 348, 354-358 (1980); *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968); *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965); *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of*

Customs, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972); *Teague* v. *Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969); *American Documentary Films, Inc.* v. *Secretary of the Treasury*, 344 F. Supp. 703, 710 (S.D.N.Y. 1972).[38] Thus, constitutional principles do not require the court of appeals' restrictive reading of the grandfather clause.

The challenged regulation is not inconsistent with 22 U.S.C. (Supp. V) 211a, which was amended in 1978 to limit to certain circumstances the Secretary of State's ability to place area restrictions on the use of United States passports. By its own terms the limitation is inapplicable here, because 31 C.F.R. 515.560 does not restrict the use of passports; instead, it regulates certain travel-related transactions pursuant to TWEA authority. 22 U.S.C. (Supp. V) 211a places no limits on the authority of the Secretary of the Treasury to regulate such transactions under the TWEA. Since TWEA authorities are instrumental in the conduct of United States foreign policy, no such limitation should be implied.

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[38]Although the right of international travel "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law" (*Kent* v. *Dulles*, 357 U.S. 116, 125 (1958)), it is not a fundamental right, such as the right of interstate travel. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978); *Califano* v. *Torres*, 435 U.S. 1, 4 n.6 (1978). Moreover, this case concerns only the more limited interest in traveling freely to a particular foreign country—an interest subject to reasonable regulation and restriction, based on national security and foreign policy considerations. See *Haig* v. *Agee*, *supra*, 453 U.S. at 306; *Zemel* v. *Rusk*, *supra*, 381 U.S. at 14-15. See also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159-160 (1963).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before

BOWNES and BREYER, *Circuit Judges*,
and PETTINE,* *Senior District Judge*.

May 16, 1983

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*Of the District of Rhode Island, sitting by designation.

BREYER, *Circuit Judge*. Appellants are American citizens who want to travel to Cuba. They cannot do so because of a Treasury Department regulation that prohibits them (and many other American travelers) from paying for "transportation-related" expenses "ordinarily incident to travel to and from Cuba" and for any other expenses "ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there." 31 C.F.R. § 515.560 (1982). Appellants attacked the lawfulness of this regulation on constitutional and statutory grounds and asked the district court for a preliminary injunction against its enforcement. The court refused to issue the injunction and this appeal followed.

We need not reach the appellants' constitutional argument, for we believe that the challenged regulation lacks statutory authority. The Treasury Department, in promulgating the regulation, concededly did not follow the "consultative" procedures mandated by the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706—procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here. Rather, the Department relied for its authority on a "nonconsultative" predecessor statute—§ 5(b) of the Trading with the Enemy Act of 1917, (TWEA), 50 U.S.C. App. § 5(b)—the relevant part of which had been *repealed* by the time it promulgated this regulation. The Department argues that a "savings clause" in the new law, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625, 1625 (1977), allows it to rely on the old law, and thereby validates its regulation. Our review of the language and legislative history of the "savings clause," however, convinces us that this is not so. Rather, the old law does not apply and the new law's procedures were not followed. The regulation thus lacks statutory authorization, and the district court improperly denied the appellants' motion for a preliminary injunction.

I

Between 1917 when the Trading with the Enemy Act was enacted and 1977 when it was modified, TWEA provided statutory authority for the President to restrict,

without congressional approval, financial transactions with foreign nations during both times of war and times of "national emergency." *See, e.g.*, Exec. Order No. 11940, 41 Fed. Reg. 43707 (1976) (export controls); Exec. Order No. 11810, 39 Fed. Reg. 35567 (1974) (same); Exec. Order No. 11796, 39 Fed. Reg. 27891 (1974) (same); Exec. Order No. 11677, 37 Fed. Reg. 15483 (1972) (same); Exec. Order No. 11387, 33 Fed. Reg. 47 (1968) (balance of payments program); Proclamation No. 2038, 48 Stat. 1689 (1933) (bank holiday); Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 Harv. L. Rev. 1102, 1104, 1114 n.61 (1983) [hereinafter cited as Harv. Note]. In 1977, however, Congress and the President modified the statute in order to narrow the President's power to impose these restrictions without first consulting with Congress. Congress did so by passing IEEPA and amending TWEA. These statutes now limit the President's power to impose economic restrictions in two ways. First, they separate his authority to regulate during war from his authority to regulate during a "national emergency." Second, they permit him to invoke the provisions of the statutes to deal with an "unusual and extraordinary threat" not involving a state of war only if he declares "a national emergency with respect to such threat," 50 U.S.C. § 1701(a), reports to Congress on the emergency every six months, 50 U.S.C. § 1703(b) & (c), and allows Congress to vote by concurrent resolution on the validity of his declaration of emergency, 50 U.S.C. §§1621(a), 1622(a).

The government concedes that, in promulgating the regulations here at issue nearly five years after the TWEA amendments and IEEPA became law, it did not follow the new procedures. The President did not declare a "national emergency," transmit appropriate reports to Congress, or grant Congress the opportunity to "veto" his actions through a resolution. The government, however, relies upon a "savings clause" in the amendment to TWEA which states:

> [T]he authorities conferred upon the President by [the old version of] section 5(b) of the Trading With the En-

> emy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country....

91 Stat. at 1625. The government argues that, because TWEA "authorities ... were being exercised" with respect to Cuba "on July 1, 1977," this language makes the old law still applicable; and the new IEEPA "consultative" requirements therefore do not apply.

In fact, on July 1, 1977—the relevant "savings clause" date—the government was *not* restricting *travel* to Cuba. Although the Treasury Department regulated travel to Cuba by means of regulations of the sort here at issue from 1963 to early 1977, on March 29, 1977, the Department repealed those travel restrictions and issued a broad, general license allowing all persons traveling to Cuba to pay for their transportation and living expenses. 42 Fed. Reg. 16621 (1977); *see also* 42 Fed. Reg. 25499 (1977) (further liberalization). The State Department, which had restricted travel to Cuba through passport regulations under 22 U.S.C. § 211a, eliminated those regulations during the same month. *See Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy & Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 15 n.7 (1977) [hereinafter cited as *Emergency Controls Hearings*] (statement of Prof. Andreas F. Lowenfeld, N.Y. Univ.). Hence, from March 1977 until May 1982, travel to Cuba was fully allowed. It is difficult to see, looking at the words of the statute alone, how the government can claim that the Treasury's "authorit[y]" to restrict travel-related financial transactions was "being exercised with respect to" Cuba "on July 1, 1977." Thus, it is difficult to see how the language of the "savings clause" exempts the Treasury Department from IEPPA [sic] and "saves" its power to promulgate these regulations without consulting Congress.

The government's response, and its most important argument, is that the words "authorities ... being exercised" in

the savings clause were meant to have a very broad meaning. In the government's view, as long as *some* TWEA authority was being exercised with respect to a country, say Cuba, on July 1, 1977, the clause saves the power to exercise *every* TWEA authority or at least every authority of the same broad type (*e.g.*, exchange control authority). Thus, if Treasury had imposed controls, for example, on the purchase of Cuban machinery, sugar, or cigars on July 1, 1977, the clause would "save" its power to impose controls on the payment of travel expenses to Cuba as well. Although this is not what the clause *says*, we have nonetheless investigated the new Act's legislative history and related administrative practice to see if there is support for the government's position. We have found none.

First, as a matter of common sense and common English, restricting, say, commodity purchases and restricting travel purchases would seem to be very different "exercises" of authority—different enough at least not to count as the exercise of the same authority. The direct effects of such restrictions are likely to differ. Most TWEA commercial restrictions seem designed simply to keep money or valuable commodities out of the hands of an unfriendly power. But Cuban travel restrictions may have only a small monetary impact, while effectively eliminating "tourist and business travel to that country." Treasury Dept. Press Release (submitted to this court).

Moreover, administrative practice suggests that the government, historically speaking, has always considered travel restrictions different from other, more typical TWEA rules and regulations. The Justice Department and the State Department for many years after the enactment of the TWEA did not even consider TWEA an important source of "travel restriction" powers. The Justice Department consistently told Congress that the President did *not have* the power to control travel by Americans to and from the United States. *See Control of Travel from and into the United States*, H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918); *Annual Report of the Attorney General of the United States* 39-40 (1918); *Annual Report of the Attorney General of the United States* 16 (1917); *Hearings Regarding*

H.R. 16742: Restraints on Travel to Hostile Areas, Hearings before the House Committee on Internal Security. 92d Cong., 2d Sess. 7539, 7561 (1972) (statement of Asst. Attorney General A. William Olson) ("there is no statute with which a person can be effectively prevented from traveling to an unauthorized area") [hereinater [sic] cited as *Restraints on Travel Hearings*]. *See also Restraints on Travel to Countries or Areas Engaged in Armed Conflict with the United States*, H.R. Rep. No. 248, 93d Cong., 1st Sess. 1 (1973). The State Department, at least before the mid-1960's, despite the existence of TWEA's criminal sanctions, "consistently [took] the position that there was no statute which imposed or authorized" criminal penalties for violations of passport restrictions. *United States* v. *Laub*, 385 U.S. 475, 485 (1967); *see Restraints on Travel Hearings*, *supra*, at 7572-81 (testimony of Robert Johnson, Deputy Director, Passport Office, Department of State). As far as we can tell, the Department of Justice, over a course of decades, brought only one or two TWEA-based travel prosecutions, and those were subsequently abandoned. The Treasury Department, in recent years, has considered TWEA an adequate source of travel restriction authority. However, documents submitted to this court indicate that Treasury still treats travel restrictions as different from other restrictions. When it imposes, administers, or enforces its travel restrictions, Treasury consults more closely with the State Department and defers more completely to State's expertise than in the case of ordinary commercial restrictions. *Accord United States-Cuba Trade Promotion: Hearing before the Subcommittee on International Trade & Commerce of the House Committee on International Relations*, 94th Cong., 2d Sess. 7 (1976) (testimony of Kirby Jones, Alamar Associates, Inc.); *id.* at 44-45 (testimony of Stanley L. Somerfield, Acting Director, Office of Foreign Assets Control, Treasury Department). Moreover, at least from 1958 to 1975, Congress continually considered and reconsidered whether it *should* enact a statute imposing criminal penalties for violations of passport *travel* restrictions. Note, *Area Restrictions And The Right to Travel Abroad*, 8 U.Cal. Davis. L. Rev. 401, 426 n.130 (1975).

These facts suggest that Congress, and the State, Justice, and Treasury Departments would not consider travel restrictions to be run-of-the-mill commercial restrictions, and would not consider the authority to impose travel restrictions to be similar to the authority to restrict commercial purchases.

Finally, unlike most commercial regulations, travel restrictions raise special constitutional issues, for they involve specially protected rights of citizens. *See Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969); *United States* v. *Laub*, 385 U.S. at 481; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 517 (1964); *Kent* v. *Dulles*, 357 U.S. 116, 126 (1958). This, too, supports what common sense suggests—namely that an "exercise" of the authority to restrict travel is different enough from, say, an exercise of the authority to prevent the public from buying Cuban cigars, that the two should not be lumped together for purposes of deciding what "authorities" Treasury was "exercising" on July 1, 1977.

Second, the legislative history makes clear that Congress intended the savings clause to be narrowly interpreted to allow the President to continue in effect only those restrictions actually exercised in July 1977. It did not want the existence of one sort of TWEA restriction in 1977 to serve as a justification for imposing a new one. In fact, it did not want the President to be able to use the old Act as statutory authority for anything new. If one reads through the history of the 1977 changes, the narrow scope of what Congress intended to "save" becomes clear.

For one thing, throughout the committee hearings and the House and Senate reports, nearly every time a legislator referred to the "savings clause" and to the exercise of the TWEA "authorities," he spoke of specific, existing "*uses*" of those authorities. For example, Congressman Cavanaugh asked the Carter Administration's principal spokesman for the amendments, Mr. Bergsten of the Treasury Department:

> MR. CAVANAUGH.... First of all, Mr. Bergsten, would it be your understanding that [the savings clause] would strictly limit and restrict the grandfa-

> thering of powers currently being exercised under 5(b) [of the TWEA] to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> MR. BERGSTEN. Yes, sir.
>
> MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.
>
> MR. BERGSTEN. That is right.

Revision of Trading with the Enemy Act: Markup before the House Committee on International Relations, 95th Cong., 1st Sess. 21 (1977) [hereinafter cited as *Markup*]; *see also Emergency Controls Hearings*, *supra*, at 147-48 (statement of R. Roger Majak, Staff Director of Subcommittee on International Economic Policy & Trade) ("There is a clear need to grandfather or deal in some special way with existing uses of section 5(b) authorities"); *id.* at 168 (statement of Rep. Cavanaugh) ("where the powers of 5(b) are currently operative"); *id.* at 182 (statement of Rep. Cavanaugh) ("ongoing uses of 5(b)"); *id.* at 189 (statement of Rep. Bingham) ("it was the purpose of [the "savings clause"] to grandfather in existing uses of 5(b)"); *Markup*, *supra*, at 9 (statement of Rep. Bingham) ("So the subcommittee settled on a limited grandfather of existing uses of international economic emergency authorities."); *Trading with the Enemy Act Reform Legislation*, H.R. Rep. No. 459, 95th Cong., 1st Sess. 11 (1977) ("exercises of emergency powers under section 5(b) which are currently in progress should be generally exempted").

Like the legislators, administration spokesmen for the bill discussed the "savings clause" in terms of existing uses of the Act's authorities. The Treasury Department also sent Mr. Leonard E. Santos to the committee hearings, who testified that the bill "grandfathered in existing uses" of § 5(b). *Emergency Controls Hearings*, *supra*, at 152; *see also id.* at 181-82 (testimony of Leonard E. Santos) (previous testimony "very clearly indicated that existing uses would be grandfathered"). Furthermore, Mr. Santos believed that "[o]nce this bill becomes law, section 5(b) will no longer provide authority in times of national emergency. So

if the President seeks to take new national emergency action, he would have to take it under this new bill [the IEEPA]." *Id.* at 211. The Treasury needed a "savings clause," he explained, because it would find it awkward to issue a new declaration of emergency to justify "existing uses" of § 5(b) authority. *Id.* at 182; *see also id.* (testimony of Leonard E. Santos) (the testimony "of both Treasury and the State Department [which did not mention travel to Cuba] listed specifically those uses of 5(b) that we would like grandfathered"); *id.* at 113 (testimony of Asst. Treasury Secretary C. Fred Bergsten). The State Department's spokesmen gave testimony that was broadly consistent with that of Mr. Bergsten and Mr. Santos. Assistant State Department Secretary Julius L. Katz, for example, urged "that the section 5(b) powers and authorities . . . now in effect" be saved. *Id.* at 101. Although very specific exercises of existing authority were discussed, *see, e.g., id.* at 108, neither the Treasury nor the State Department mentioned a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions.

For another thing, when Congressman Bingham, a principal legislative sponsor of the TWEA amendments, discovered draft language that might have allowed a broader reading of the "savings clause," thereby preserving TWEA powers that were *not* then exercised, he deliberately struck the language from the bill. The subcommittee staff's initial draft of the "savings clause" not only preserved "any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act," but also stated that "any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances." *Amendments to the Trading with the Enemy Act: Subcommittee Working Draft of June 8, 1977*, 95th Cong., 1st Sess. § 101(b). Subcommittee Staff Director Majak explained that under the second provision, "with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by

section 5(b).... I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage." *Emergency Controls Hearings, supra*, at 167. Congressman Bingham objected to this draft, making clear that he did not want to grandfather the former—the "situation." Rather, he wanted to grandfather only the latter, namely the particular existing uses of those powers. He said, "I don't know why it should be necessary to give [the President] authority to expand what has already been done," *id.* He therefore opposed the second clause. And, the subcommittee eventually dropped it from the bill.

Finally, an examination of the purpose behind the "savings clause" supports the apellants, not the government. Congress provided the "savings clause" for existing trade embargoes to mitigate the adverse effect that automatic repeal would have had on the President's negotiating position with respect to other countries. To have required the President to announce publicly a *new declaration* of emergency in order to continue an *existing embargo* would have required him to undertake a political act with international political impact. The result, as described by Prof. Lowenfeld before the subcommittee, might have been an "inappropriate interference in negotiations being carried out by the Executive Branch...." *Emergency Controls Hearings, supra*, at 19. It would be "very awkward," Professor Lowenfeld explained, for Congress suddenly to call an "end" to the Cuban embargo "without any deal or understanding." *Id.; see also id.* (testimony of Prof. Lowenfeld) ("perhaps ... [the Cuban embargo] should not be terminated without a quid pro quo"). Assistant Treasury Secretary Bergsten repeated this theme, stating that "a unilateral termination of the embargoes" that would require the President to reassert a national emergency "would severely undermine the U.S. negotiating position with those countries, and our worldwide posture." *Id.* at 103. Cuban travel restrictions did not involve the problem at which this clause was aimed, however, for the very reason that they were

not in effect in 1977. Thus, their reimposition in 1982 automatically required a public declaration with political impact *anyway*. For example, when they were reimposed Assistant Treasury Secretary John M. Walker declared the restrictions "an important part of this Government's policy of tightening the current trade and financial embargo against Cuba." "Cuba will not be allowed," he warned, "to earn hard currency from American tourists at a time when Cuba is actively sponsoring armed violence against our friends and allies. ..." Crossette, *U.S., Linking Cuba to 'Violence,' Blocks Tourist and Business Trips*, N.Y. Times, Apr. 20, 1982, at A1, col. 4. Thus, the reason for the "savings clause"—the need to avoid this type of public act in order to continue *ongoing* restrictions—simply bears no relation to this case. In light of the consequent lack of justification for a "savings clause" to preserve powers not then being exercised, it is not suprising that a reading of the history of IEEPA and the TWEA amendments suggests, even more strongly than a few quotations can indicate, that Congress intended IEEPA, not the old TWEA, to apply to particular restrictions, such as Cuban travel, not in effect in July 1977.

II

We conclude that, given ordinary principles of statutory construction, *see, e.g., Drysdale* v. *Spirito*, 689 F.2d 252, 256-57 (1st Cir. 1982); *Constance* v. *Secretary of HHS*, 672 F.2d 990, 995-97 (1st Cir. 1982), the "savings clause" does not apply. We are reinforced in our conclusion by several factors that suggest that even if the statute (and its history) were more ambiguous, we should nonetheless interpret it to favor appellants.

First of all, this case involves travel which the Supreme Court has held to be "a constitutional right closely related to" those activities that the Bill of Rights protects from infringement by Congress. *Aptheker* v. *Secretary of State*, 378 U.S. at 517; *see Shapiro* v. *Thompson*, 394 U.S. at 629; *United States* v. *Laub*, 385 U.S. at 481; *Kent* v. *Dulles*, 357 U.S. at 126; Note, *Constitutional Protection of Foreign Travel*, 81 Colum. L. Rev. 902, 906 (1981). Although

courts often defer to the Executive in the area of foreign affairs, *see, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654, 672-73, 678 (1981); *Zemel* .v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 314-22 (1936), the Supreme Court has explicitly instructed us to "construe narrowly all delegated powers that curtail or dilute" the right to travel. *Kent* v. *Dulles*, 357 U.S. at 129; *see Aptheker* v. *Secretary of State*, 378 U.S. at 508. That principle of narrow interpretation applies here.

Moreover, the savings clause, as we interpret it, does not prevent the other two branches of government from taking whatever steps they believe necessary to conduct our affairs with Cuba. It simply requires the President in conducting those affairs to consult with the legislative branch according to the terms of IEEPA. The TWEA amendments and IEEPA move travel restrictions of this sort from the first of the categories mentioned by Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (areas in which Congress has delegated its authority to the President) to the third category, *id.* at 637-38 (areas in which Congress has taken measures inconsistent with the President's claim to power). In situations involving the third category, "[c]ourts can sustain exclusive presidential control ... only by disabling the Congress from acting upon the subject." *Id.* In effect, we do not *limit* the exercise of foreign affairs powers by the other branches, so much as we *allocate* the powers of decision-making *between* the other two branches according to the guidelines Congress set forth. We do not arrogate to ourselves the power to make foreign policy, so much as we preserve the constitutional "equilibrium," *id.* at 638, between the President and Congress and insist that the Executive Branch follow the laws that the Legislative Branch enacts.

Finally, the Supreme Court has also suggested that we look to other contemporaneously enacted statutes for the light they cast on the historical context of the statute at issue. *See Dames & Moore* v. *Regan*, 453 U.S. at 678. Were we to do so here, we should find additional grounds for interpreting the TWEA savings clause restrictively. The

1977 legislative changes at issue were only part of a series of laws aimed at imposing Congressional limits upon the President's restrictive powers. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548) (restrictions on Presidential power to employ U.S. forces abroad); National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651) (procedures for Presidential declarations and continuations of national emergencies). In 1978 Congress amended the Passport Act, 22 U.S.C. § 211a, to prohibit the executive branch from imposing peacetime passport travel restrictions without the authorization of Congress except for health and safety considerations. Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978); *see Haig* v. *Agee*, 453 U.S. 280, 290 n.18 (1981). At the time, the Senate Foreign Relations Committee stated in its Report that it believed "that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy." *Foreign Relations Authorizations Act, Fiscal Year 1979: Report of the Senate Committee on Foreign Relations*, S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). To interpret the "savings clause" as the government suggests, would make the Passport Act amendment meaningless in terms of Cuba, for the Executive Branch could unilaterally impose Cuban travel restrictions by imposing currency restrictions as it did here. A more narrow interpretation of the TWEA savings clause—by making applicable IEEPA's consultative procedures—helps to harmonize the two statutes. Thus, these additional considerations and interpretive principles help support our conclusion. As Part I indicates, they are not in fact necessary to reach it.

III

To grant a preliminary injunction, a court must consider whether plaintiffs will suffer irreparable injury if the injunction is denied, whether such injury outweighs any harm that the injunctive relief would cause the defendants, whether plaintiffs have a likelihood of succeeding on the

merits, and whether the public interest would not be harmed by a preliminary injunction. *Agency Rent-A-Car, Inc.* v. *Connolly*, 686 F.2d 1029, 1034 (1st Cir. 1982); *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). The district court here denied the plaintiffs' motion on the grounds that they had not demonstrated a sufficient likelihood of succeeding on the merits. We disagree. For the reasons stated above in part I, we believe that the "savings clause" of the amendment to TWEA does not authorize the executive to issue the regulation at bar. For the reasons stated in part II, we believe that even if the legislative history of the "saving clause" were not so clear, we would still have to find it inadequate support for the government's attempt to restrict travel to Cuba without consulting Congress. Thus, we hold the challenged restrictions on travel illegal. And, in light of the definitiveness with which the law can be stated, plaintiffs need not make a separate showing of irreparable harm, *see, e.g., United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948, at 461 (1973), or of the balance of injuries, *see, e.g., Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894, 901 (E.D. Mo. 1969); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 576 (D.C.D.C.), *aff'd*, 343 U.S. 579 (1952), and the public has no interest in the enforcement of an illegal regulation. Accordingly, a preliminary injunction should issue against the enforcement of the April 20, 1982 amendments to 31 C.F.R. § 515.560, 47 Fed. Reg. 17030.

The order of the district court is vacated, and the case is remanded with instructions to issue a preliminary injunction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

Before BOWNES, and BREYER, *Circuit Judges*,
and PETTINE,* *Senior District Judge*

MEMORANDUM AND ORDER

Entered: June 16, 1983

The government moves for rehearing and it seeks a stay of this court's mandate. We deny these motions. Because the government states that the decision has significant implications for foreign policy, detailed discussion of the government's requests and reasons is appropriate.

I

The Petition for Rehearing

We do not believe that the arguments the government advances provide an adequate basis for a rehearing. First, contrary to the government's current suggestion, the government had adequate opportunity to brief and to argue the question upon which the court's decision turned, namely, whether travel is sufficiently like "say, commodity purchases ... to count as the exercise of the same authority"

*Of the District of Rhode Island, sitting by designation.

for savings clause purposes. (Slip op. at 7.) The government's initial brief argued at length that the savings clause should be interpreted to embargo an existing state of emergency rather than an existing set of regulations on a given subject. Oral argument refined the question further; and, the government filed a post-argument brief in response to the court's question:

> What reason is there to believe that administrators have treated "travel" as a distinct and separate category of economic transaction under the statutes?

The government stated in its post-argument brief that it would seek permission to file a further brief if there was more it wished to say. It did not do so. It seems to us that the government had a fair opportunity to address the issues; that the issues were adequately focused; and that the issues were adequately briefed by both sides.

Second, the government argues that it *was* exercising its authority to restrict travel to Cuba on July 1, 1977, because of the *form* of its regulations—because its regulations consisted of a general rule forbidding *all* transactions with Cuba, *see* 31 C.F.R. § 515.201, followed by a "General License" allowing "[a]ll transactions ordinarily incident to travel to and from [and in] Cuba," *see* 42 Fed. Reg. 16621 (Mar. 29, 1977), *codified at* 31 C.F.R. § 515.560(a). The court treated this argument as invalid because it assumed that *substance* (*i.e.*, was travel in fact being regulated?) rather than *form*, controlled. The government devoted little attention in its initial brief to this argument, and nothing it says there or in its new brief convinces us that the court's assumption was faulty.

Third, the government now argues that *in fact* it was regulating Cuban travel on July 1, 1977, because travelers could bring back only $100 worth of goods for personal use, because it allowed only non-scheduled flights, and because domestic credit card issuers were forbidden to contract with Cuban enterprises. These restrictions, in our view, merely represent an effort to reconcile rules that allow travel with rules that forbid ordinary commercial transactions. Regardless, their impact on "travel" is too minor to change the result.

Fourth, the government points to two statements in the legislative history of the savings clause which it believes support its position. *See Emergency Controls on International Economic Transactions: Hearings Before the Subcommittee on International Economic Policy & Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 211 (1977) (Statement of Treasury Department spokesman: "If the President claims that he must do something new with respect to Cuba, . . . that, of course, is automatic."); *id.* at 215 (Statement of Treasury Department spokesman to the effect that currently there "are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve travel to those countries [*i.e.*, Cuba and Vietnam] and the exchange of goods.") In fact, the extent to which these statements help the government is unclear. When the spokesman used the word "automatic" did he mean that new regulations would automatically take effect without the IEEPA procedures, or did he mean (in context) that it was obvious the new procedures must be used? When he referred to restrictions in effect on travel to Cuba (a few weeks after they had been removed), was he focusing on the issue considered here, or was he simply comparing a (later changed) draft of the grandfather clause that *plainly accepted* the government's view of the savings clause with another (here irrelevant) grandfather clause designed to save certain asset control powers? Regardless, the overall impression that the legislative history gives remains the same. And, the two quotations do not warrant significant change in the court's conclusions. We shall, however, modify the opinion to make clear that the government believes these quotations support its position.

Fifth, the government argues that the court's decision will affect foreign policy adversely by requiring the Executive Branch to follow IEEPA procedures whenever it wishes to tighten present restrictions. We point out that the court's opinion concerns travel, which it considered a separate category of restriction; it does not concern minor modifications of existing rules. The question of whether it is desirable for the President to declare an emergency and

to consult with Congress when imposing restrictions on (previously unrestricted) travel would seem to be a matter for the Executive and Legislative branches, not this court.

II

The Petition for a Stay of Mandate

The court issued its decision in this case on May 16, 1983. Under Fed. R. App. P. 41(a) the court's mandate would have issued at the close of business on June 6, 1983, had the government not filed a rehearing petition. Since it did so, the mandate, in the ordinary course of events, would issue seven days after entry of an order denying the petition. The government seeks, in this event, an additional stay of our mandate for thirty days while it decides whether or not to seek certiorari.

Although the government seems to ask for a short period of additional time, more is at stake. Under Fed. R. App. P. 41(b), if we grant this additional stay and if the government then files a petition for certiorari, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(b). Thus, what is at issue is whether, during the several months probably necessary for the disposition of the government's certiorari petition, the appellants will be free to travel to Cuba.

In deciding whether or not to grant this application, we have considered several factors. Ordinarily, where a party has won on appeal after losing in the district court, it is appropriate to put the appellate court decision into effect pending the Supreme Court's ruling. The winning *appellate* court party has the better claim to the law's support. It is therefore the practice in this circuit and in the Supreme Court, *cf.* Sup. Ct. R. 44.4, not to grant stays except in unusual cases. On the other hand, in this instance the losing party points to considerations of foreign policy allegedly threatened by the court's decision. That factor weighs in favor of the stay. Nonetheless, appellants are asserting the right to travel, "a constitutional liberty closely related to" those activities that the Bill of Rights protects from infringement by Congress. *Aptheker* v. *Secretary of State*,

378 U.S. 500, 517 (1964). This factor weighs against the stay.

Finally, we have made a judgment about the likelihood of the Supreme Court reaching a different result. We can understand how others could reasonably conclude that the legislative history is ambiguous and should be read differently. The Supreme Court, however, has instructed us to "construe narrowly all delegated powers that curtail or dilute" the right to travel. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). And, we doubt that a reasonable reader could conclude that the relevant legislative history *clearly* supports the government. Thus, we think it unlikely that the Supreme Court will reach a different decision.

After considering the various harms likely to be caused by a stay, the rights of the parties, the practical implications of the decision, and the likelihood of the government's success in further proceedings, we conclude that the government's request for an additional stay should be denied.

ORDER

The opinion shall be modified as follows:

On page 13, lines 16 through 18, delete the words:

> neither the Treasury nor the State Department mentioned a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions.

Substitute therefor the words:

> the Treasury and the State Departments mentioned scarcely a word about the need to preserve through the "savings clause" the right to impose Cuban travel restrictions. *But cf. id.* at 215 (testimony of Leonard E. Santos).

The application for rehearing and the application for stay of mandate are denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

Before CAMPBELL, *Chief Judge*,
COFFIN, BOWNES and BREYER, *Circuit Judges*
and PETTINE,* *Senior District Judge*

ORDER OF COURT

Entered: June 16, 1983

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc," which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is denied.

By the Court
FRANCIS P. SCIGLIANO
Clerk.

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*Of the District of Rhode Island, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1695

RUTH WALD, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

DONALD REGAN, ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered May 16, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court of July 22, 1982, denying plaintiffs' motion for a preliminary injunction is vacated and the cause is remanded to that court with instructions to issue a preliminary injunction consistent with the opinion filed this day.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
82-1690-T

RUTH WALD, ET AL., PLAINTIFFS

AND

PUERTO RICAN OLYMPIC COMMITTEE, ET AL.,
INTERVENING PLAINTIFFS

v.

DONALD REGAN, ET AL., DEFENDANTS

Order

July 22, 1982

TAURO, D.J.

On July 16, 1982, after hearing, Magistrate Collings issued a Report and Recommendation that the court deny plaintiffs' motion for a preliminary injunction. Subsequently, the intervening plaintiffs filed a second motion for a temporary restraining order,[1] which was the subject of a hearing before the court on July 21, 1982. Plaintiffs' objections to the Magistrate's report were filed with this court on July 19, 1982, and July 22, 1982.

Plaintiffs' claims raise issues concerning the meaning of applicable federal statutes and regulations, in the context of relevant legislative history, Supreme Court decisions and factual circumstances extant during critical periods of policy determination. Having considered the arguments that the parties presented in their submissions and at the July 21st hearing, and without making specific rulings on

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[1] Judge Mazzone, sitting as the Judge assigned to the Miscellaneous Business Docket, issued a temporary restraining order, now expired, which did not apply to these intervenors. Judge Skinner denied without prejudice an earlier motion by the intervenors for a temporary restraining order.

all aspects of the Magistrate's report and plaintiffs' objections thereto, the court finds that plaintiffs have failed to show that their claims based upon the applicable statutory law and inferences as to Congressional intent are likely to succeed on the merits.

Plaintiffs' additional claims raise fundamental constitutional issues that might well be proven at trial to be meritorious. Nevertheless, despite the fine arguments of counsel, the Court determines that plaintiffs have not to date demonstrated, in light of relevant Supreme Court decisions,[2] that such claims have a substantial likelihood of success on the merits.

Accordingly, the Court hereby DENIES the intervenors' motion for a temporary restraining order.

Further, the Court approves that part of the Magistrate's Report consistent with the Court's findings, *supra*, overrules related objections filed by the plaintiffs, and ORDERS that plaintiffs' motion for a preliminary injunction be DENIED.

IT IS SO ORDERED.

/S/ JOSEPH L. TAURO

United States District Judge

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[2] *See, e.g., Haig* v. *Agee*, 453 U.S. 280 (1981); *Aptheker* v. *Secretary of State*, 378 U.S. 506 (1964); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Kent* v. *Dulles*, 357 U.S. 116 (1958).

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MORALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS,

v.

DONALD REGAN, SECRETARY OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY, DENNIS M. O'CONNELL, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, GEORGE SHULTZ, SECRETARY OF STATE, AND RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, DEFENDANTS,

PUERTO RICO OLYMPIC COMMITTEE AND RAFAEL MORALES CUBANES, ON HIS OWN BEHALF AND BEHALF OF THE ASOCIACION DE TURISTAS OLIMPICOS DE PUERTO RICO (ATOPRICO), AND OTHER PUERTO RICO SPORTS FANS, INTERVENING PLAINTIFFS.

REPORT AND RECOMMENDATION ON MOTIONS FOR PRELIMINARY INJUNCTION

COLLINGS, U.S.M.

The Complaint in this case was filed on June 17, 1982. Filed at the same time was a Motion For A Preliminary Injunction (#03). The matter was referred to a United States Magistrate on June 23, 1982 for a Report and Recommendation on this motion as well as a Motion for a Temporary Restraining Order (#06) filed by the plaintiff Francis E. Bradley on June 23, 1982.

The case came on for initial hearing on June 25, 1982 before me. At that time, both sides objected to my hearing the Motion For Temporary Restraining Order. As a result, I issued a Report Re: Motion For Temporary Restraining Order and Order Scheduling Hearing On Motion For Preliminary Injunction (#08) in which I referred the Motion For A Temporary Restraining Order to the U.S. District Judge assigned to the Miscellaneous Business Docket and set the hearing before me on the Motion For A Preliminary Injunction for July 1, 1982 at 2:00 P.M.

On June 25, 1982, Judge Mazzone, sitting as the Judge assigned to the Miscellaneous Business Docket, allowed the Motion For A Temporary Restraining Order.

On the morning of July 1, 1982, the Puerto Rico Olympic Committee and Rafael Morales Cabranes, on his own behalf and on behalf of the Asociacion De Turistas Olimpicos De Puerto Rico (ATOPRICO), and other Puerto Rico sports fans filed a Petition For Intervention (#10), a Verified Intervening Complaint (#11), and a Motion For Preliminary Injunction And Temporary Restraining Order (#12). At the hearing at 2:00 P.M. on July 1, 1982, after the defendants objected to my hearing the Intervening Plaintiffs Motion For A Temporary Restraining Order, I issued a Report Re: Motion For Temporary Restraining Order (#13) in which I referred the Intervening Plaintiff's Motion For A Temporary Restraining Order to the Judge assigned to the Miscellaneous Business Docket.

On July 1, 1982, Judge Skinner, sitting as the Judge assigned to the Miscellaneous Business Docket, allowed the Petition For Intervention, denied the motion for a temporary restraining order without prejudice, and ordered that the motion for a preliminary injunction consolidated with the plaintiff's motion for preliminary injunction at a hearing before me.

Thereafter, on July 1, 1982, I heard arguments from the plaintiffs, the defendants, and the intervening plaintiffs.

THE FACTS

The facts are not in any substantial dispute. In capsule form, it can be said that this case arises out of a change in Federal Regulations promulgated on April 20, 1982 (effective May 15, 1982). On that date, the Office of Foreign Assets Control of the Department of the Treasury amended Section 515.560 of the Cuban Assets Control Regulations (Title 31, C.F.R., Sec. 515.201 *et. seq.*) so as to limit travel to Cuba for specified purposes, including official travel, visits to close relatives, and travel connected with research, newsgathering, or similar activities. Travel-related transactions relating to ordinary tourist or business travel, permitted since 1977, were no longer permitted unless the person desiring to travel to Cuba received a specific license from the Treasury which could be granted in appropriate cases for humanitarian reasons or for purposes of public performance in Cuba, as in connection with cultural or sports activities. *See Federal Register*, Vol. 47, No. 76 at 10730 (April 20, 1982). This amendment to the regulations had as its stated purpose "... to reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba." *Id.*

According to the Complaint, the plaintiffs are either persons who wish to travel to Cuba themselves but do not qualify for a specific license or groups who sponsor travel to Cuba by persons who do not qualify for a specific license. They allege that the new regulations prohibit them from travelling to Cuba or sponsoring trips to Cuba after May 15, 1982 where such activity was lawful prior thereto.

Specifically, Ruth Wald seeks to travel to Cuba on or about August 15, 1982 for ten days to meet and make contact with Cuban women; Marion Lowe seeks to travel to Cuba at the same time stating that she is "... curious about the country [and is] ... particularly interested in learning how the role of women has changed in Cuba since 1969"; Rosario Morales seeks to visit Cuba this summer to visit friends; Francis E. Bradley, Assistant Headmaster of George School, Newton, Pennsylvania seeks to lead a trip of students to Cuba this summer to learn about "a different

culture and social system"; Rev. Alice Hageman seeks to visit Cuba for two weeks in August 1982 as a guest of the Women's Department of the Cuban Ecumenical Council; the Cuba Resources Group seeks to organize tours to Cuba by American citizens; Robert C. Howard seeks to travel to Cuba in December, 1982 with his children and several friends; the Center for Cuba Resources seeks to arrange study tours in Cuba and has projected tours to Cuba during the September-December, 1982 period in the areas of literature, music, film, economics, and politics; and, lastly, Linda Turner seeks to visit Cuba "this winter" in order to learn about the Jewish community there. (*See* attachments to Notice Of Motion For Preliminary Injunction, #03).

With respect to the Intervening Plaintiffs, the Puerto Rico Olympic Committee is a non-profit corporation. Rafael Morales-Cabranes is President of the Asociation de Turistas Olimpicos de Puerto Rico (ATOPRICO), also a non-profit corporation, whose sole purpose is to travel with and support Puerto Rican athletes at the Olympic Games, the Pan-American Games, and the Central American and Caribbean Games. In or about mid-1981, the Organizing Committee of the XIV Central American and Caribbean Games (CASCO) selected Havana, Cuba as the site for the games in August, 1982. Shortly after the decision was made to hold the games in Havana, the President of the Puerto Rico Olympica Committee made arrangements for the Cuban government to provide accommodations for about 1,000 relatives, friends and fans of competing athletes who would go to Cuba to view the games and support the team. An agreement was reached with the Cuban Government whereby the Puerto Rican sports fan wishing to go could do so for $1200 per person, of which the Puerto Rico Olympic Committee would earn approximately 10-15% to help defray costs. 1,000 sports fans subscribed to go on the trip. All of the arrangements were made before the change in the regulations in April, 1982. After the change in the regulations, an application was made for a specific license in accordance with the regulations, but although a license was granted for the athletes and coaches and some other sup-

port personnel, the license for the 1,000 sports fans was denied.

PLAINTIFFS' ALLEGATIONS

In summary form, the plaintiffs allege that the President and the Secretary of the Treasury acted illegally in promulgating the change to the Cuban Assets Control Regulations on April 20, 1982. Specifically, they contest the power of the executive branch to issue the regulations under Section 5(b) of the Trading With The Enemy Act, 50 U.S.C. App., Sec. 5(b), which is the authority under which the executive presumed to act in promulgating the change. In addition, the plaintiffs allege that the regulations are in violation of Title 22, United States Code, Section 211(a), dealing with the executive's inability to promulgate geographic limitations on travel; are vague; deprive plaintiffs of their First Amendment rights; deprive plaintiffs of their right to travel without due process of law in violation of the Fifth Amendment; are being administered in an arbitrary and discriminatory manner in violation of the due process clause; and deprive plaintiffs of equal protection.

LEGISLATIVE AND REGULATORY HISTORY

The Cuban Assets Control Regulations were promulgated on July 9, 1963 and replaced the Cuban Import Regulations issued on February 6, 1962. The regulations were issued pursuant to the authority granted by Section 5(b)(1) of the Trading With The Enemy Act, 50 U.S.C. App., Section 5(b)(1) which then read as follows:

> During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through or to any banking institution and the importing, exporting, hoarding, melting or earmarking of gold or

silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States.

Since 1963 was not "during the time of war", the regulations were promulgated on the basis that 1963 was "during ... [a] period of national emergency declared by the President". The "national emergency declared by the President" which was in effect in 1963 was the declaration of national emergency by President Truman on December 16, 1950, which has remained in effect. This delegation, and the President's promulgation of the Cuban Assets Control Regulations pursuant to it, have been upheld by the Courts. *Sardino* v. *Federal Reserve Bank of New York*, 381 F.2d 106 (2 Cir., 1966).

The Cuban Assets Control Regulations, as they existed from 1963 to 1977, did not specifically state that travel to Cuba was prohibited, although the Government takes the position that the regulations inferentially prohibited such travel since any travel would necessarily involve transactions generally prohibited by Title 31, C.F.R., Section 515.201. The Government supports this interpretation by reference to the Written Statement of Professor Andreas Lowenfeld to the *Hearings before the Subcommittee on International Economic Policy and Trade* of the Committee on International Relations, House of Representatives, 95th Congress, 1st Sess., March 29, 1977 at p. 15 and also the Affidavit of Myles R.R. Frechette (para. 6) filed in the instant case on July 1st.

However, it is fair to say that the regulation of travel to and from Cuba during the period 1963 to 1977 was primarily accomplished by the State Department through its administration of the passport laws. *See Zemel* v. *Rusk*, 381

U.S. 1,3,23 (1965); *United States* v. *Laub*, 385 U.S. 475, 478-479 (1967). On January 16, 1961, the Department of State issued Public Notice 179 which stated that: "Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State..." 26 Fed. Reg. 492 cited in *United States* v. *Laub, supra* at 478-9. These Public Notices continued to be issued, the last one being issued on September 16, 1976, which expired of its own terms six months later. *Federal Register*, Vol. 41, No. 184 at 41105, 9/21/76.

Six months later, i.e. March 16, 1977, a new administration was in office and the Public Notice was not renewed. Passports thus became valid for travel to Cuba. The new administration changed its policy with respect to travel to Cuba, and in May of that year, President Carter amended the Cuban Assets Control Regulations, *See Federal Register*, Vol. 42, No. 96 at 25499-500 (5/12/77), so that Title 31, C.F.R., Section 515.560, provided, in pertinent part:

> *Certain transactions incident to travel to and in Cuba.*
>
> (a) The following transactions are authorized:
>
> (1) All transactions ordinarily incident to travel to and from Cuba.
>
> (2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.
>
> * * * *
>
> (4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accomodations [sic] in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration of authorized services.

* * * *

However, from 1973 to 1976, there was Congressional activity with respect to the basic legislation authorizing the declaration of a national emergency and the use of the authority by the President. In 1973, the Special Committee on the Termination Of National Emergencies in the Senate began a study and investigation of the matter, and at the conclusion of the study, Congress made significant changes in the legislation, legislation which underlies the authority by which the Cuban Assets Control Regulations were promulgated. Specifically, in 1976, the Congress, in the National Emergencies Act, Title 50, U.S.C., Section 1601 *et. seq.*, terminated "all powers and authorities possessed by the President . . . as a result of the existence of any national emergency in effect on September 14, 1976", said termination to be effective two years from September 14, 1976. On December 28, 1977, Congress passed the International Emergency [Economic] Powers Act of 1977, Title 50, U.S.C., Section 1701 *et. seq.*, which eliminated the power to invoke the Trading With The Enemy Act in times of a declared national emergency, leaving the Trading With The Enemy Act applicable only in time of declared war and establishing new procedures to deal with new "national emergencies".

However, as part of the International Emergency [Economic] Powers Act of 1977, Congress added a "grandfather" clause with respect to powers being exercised as of July 1, 1977 as a result of a national emergency which had been declared under the Trading With The Enemy Act prior to September 14, 1976 and which, absent such a clause, would automatically expire two years from September 14, 1976 as a result of the National Emergencies Act, Title 50, U.S.C., Section 1601. This provision, which can be found in the note to Title 50 Appendix, U.S.C., Section 5 reads as follows:

> **Notwithstanding the amendment made by subsection (a) [amending section 5(b)(1) of the Trading With The Enemy Act so as to make it applicable only in times of declared war and not in times of declared national emergencies], the authorities conferred upon the President by section 5(b) of the Trading With the Enemy**

> Act which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by a President before such date may be continued to be exercised with respect to such country, except that unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act [Title 50, U.S.C., Sec. 1601(a)] at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [September 14, 1976]. The President may extend the exercise of such authorities with respect to such country for one-year period upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Section 101(b) of Public Law 95-233.

There is no question but that the President has lawfully extended "the exercise of such authorities" for one-year periods, the last being an extension by President Reagan which will expire on September 14, 1982 and which provided, in pertinent part:

> Therefore, pursuant to the power conferred upon me by section 101(b) of Public Law 95-223, I extend for one year, until September 14, 1982, the exercise of those authorities with respect to countries affected by:
>
> * * * *
>
> (3) the Cuban Assets Control Regulations, 31 CFR Part 515; . . .

There is further no dispute that it is Section 101(b) of Public Law 95-223 and the extension made pursuant to it which the Government based its power to amend the Cuban Assets Control Regulations, Title 31, C.F.R., Section 515.560 on April 20, 1982 as recited *supra*.

What is in dispute is whether the President had such power in April, 1982 when, as of July 1, 1977, the regulations did not contain the restrictions of travel-related activities to Cuba which were imposed in April, 1982.

THE LAW WITH RESPECT TO THE RIGHT TO TRAVEL

The right to international travel is not protected by the First Amendment to the Constitution, since it is an inhibi-

tion of action, not speech. *Zemel* v. *Rusk*, 381 U.S. 1 at 16-17 (1965). Rather, the right to international travel "... is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent* v. *Dulles*, 357 U.S. 116, 125 (1958). *See also United States* v. *Laub*, 385 U.S. 474, 481 (1967). Thus, any infringement of that 'liberty' must be pursuant to the law-making functions of the Congress. *Kent* v. *Dulles*, *supra* at 129. The cases starting with *Kent* v. *Dulles* and ending with *Haig* v. *Agee*, 453 U.S. 280 (1981), albeit dealing with the issue of the executive's power to restrict passports, have all focused on whether Congress, by one means or another, has approved, either explicitly or impliedly, of the executive's action in restricting passports. Thus, in *Zemel* v. *Rusk*, the Court found that the Passport Act of 1926, Title 22, U.S.C., Section 211a (1958 ed.), although not expressly so providing, gave the executive power to place area restrictions on travel because there was "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved such power." 381 U.S. at 12.

However, in 1978, Congress amended Title 22, U.S.C., Section 211(a) to add the phrase:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

As a result, there now can be no argument that Congress, except in the limited circumstances listed in the statute which are not applicable to the case at bar, now approves of area restrictions on travel by means of restricting passports as not being valid for travel to certain areas; rather, they have specifically stated that the executive does not have that power.

In my view, the amendment to Title 22, U.S.C., Section 211(a) does not invalidate the new regulations promulgated on April 22, 1982 restricting travel to Cuba, because the section only dealt with the power to restrict *passports;* al-

though the April, 1982 regulations have the *effect* of restricting travel to Cuba, the executive has done nothing to "designate" passports as being restricted for travel in Cuba.

Rather, I view both the court decisions and the legislative changes to Title 22, U.S.C., Section 211(a) as more sharply defining what the dispute in this case is—i.e., was the President acting within the power granted to him by Congress in promulgating the changes to the Cuban Asset Control Regulations in April, 1982. For as *Kent* v. *Dulles*, *supra* teaches, and subsequent decisions have reaffirmed, any regulation on travel, a "liberty" protected by the Fifth Amendment, must be done pursuant to the law-making function of the Congress. 381 U.S. at 129.

LIKELIHOOD OF SUCCESS ON THE MERITS

In this Circuit, in order to be entitled to a preliminary injunction, a plaintiffs must demonstrate (1) a probability that they will prevail on the merits and (2) a danger of immediate irreparable harm absent such injunctive relief. *Automatic Radio Manufacturing Co.* v. *Ford Motor Company*, 390 F.2d 113, 115 (1 Cir., 1968). In the instant case, I do not find that the plaintiffs have carried their burden of establishing a probability of success on the merits.

As stated *supra*, the core issue is what powers were conferred by Congress on the President by the so-called "grandfather" clause of Section 101(b) of Public Law 95-223, which is reproduced in full at pp. 11-12, *supra*. What Congress actually wrote in the statute is "...*the authorities* conferred upon the President by Section 5(b) of the Trading With The Enemy Act *which were being exercised with respect to a country on July 1, 1977* as a result of a national emergency declared by a President before such date *may be continued to be exercised with respect to such country...*" (Emphasis supplied). What Congress meant by the underscored phrases is in controversy.

The Government takes the position that the phrases mean that if on June 1, 1977, the President was exercising any authority to regulate transactions with respect to a country pursuant to a declared state of emergency, Con-

gress gave him the full authority to regulate those transactions with respect to that country pursuant to the national emergency, including the authority to impose additional restrictions on transactions which were not in effect on June 1, 1977. Therefore, the argument runs, even though there were few restrictions on travel to Cuba on July 1, 1977 (after President Carter amended Title 31, C.F.R., Section 515.560 on May 12, 1977 to permit such travel), since *some* authority to restrict travel was still being exercised as of July 1, 1977, the President could impose tighter restrictions pursuant to the "grandfather" clause, since he was exercising some authority on July 1, 1977.

The Government puts the argument another way—Title 31, C.F.R., Section 515.201, which has been in effect continuously from 1963 to the present, and thus in effect on July 1, 1977, bans virtually all transactions with Cuba except as "specifically authorized" by the Secretary of the Treasury "by means of. . . .licenses." As of June 1, 1977, in Title 31, C.F.R., Section 515.560, the Secretary of the Treasury had "specifically authorized" "transactions ordinarily incident to travel to and from Cuba" as an exercise of his basic authority in Section 515.201 to do so, but the authority is the authority to regulate—that is to "specifically authorize" or not—and that authority—i.e. the authority to regulate—was being exercised on June 1, 1977. Thus, the President's authority to regulate in a different, i.e. more restrictive manner in 1982, is preserved by the "grandfather" clause.

After a careful review of all the papers filed in this case, as well as the legislative history upon which the plaintiffs rely, I am of the opinion that the government's interpretation has more merit than the interpretation urged by the plaintiffs. I thus find that the plaintiffs have not met their burden of establishing a probability that they will prevail on the merits.

First, that there is precedent for the government's interpretation. In *United States* v. *Fernandez-Pertierra*, 523 F. Supp. 1135 (1981), Judge Kehoe was faced with the validity to amendments which President Carter promulgated to the Cuban Asset Control Regulations on May 19, 1980 in re-

sponse to the so-called "Mariel Boatlift". The amendment, which added Title 31, C.F.R., Section 515.415, had as its purpose to interpret Section 515.201 so as to prohibit transactions in connection with the transportation of certain Cuban nationals to the United States" and "[t]he need for such amendment is to make it clear that all such transactions are prohibited by the regulations." *Federal Register*, Vol. 45, No. 98, May 19, 1980 at p. 32671. Judge Kehoe wrote:

> The amendment [to 5(b) of the Trading With The Enemy Act, Public Law 95-223, December 28, 1977] did, however, allow the President to continue exercising those authorities conferred upon him by Section 5(b) "which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date[.]" Section 101(b) of Pub. L. 95-223, 91 Stat. 1625. By this "grandfather" provision, the President, or his designee, continues to possess the authority to issue regulations pertaining to Cuba. Accordingly, the Cuban Asset Control Regulations, originally promulgated in 1963, and supplemented from time to time since then, continue to have the force and effect of law...

Id. at 1138.

Second, it is my opinion that a close reading of the legislative history, upon which the defendants place their main reliance, indicates that Congress did not intend to freeze the specific regulations in effect on June 1, 1977; rather, what Congress intended was to allow the President to exercise the authorities with respect to Cuba which he was exercising on that date, but did not intend to restrict the particular manner in which the authority was being exercised. With respect to travel, since travel to Cuba was regulated as of June 1, 1977, albeit in the form of allowing most travel, the President in 1982 had the power to change the extent of regulation of travel, that is to regulate the travel in a more restrictive manner.

The defendants make much of the fact that before the Subcommittee on International Economic Policy And Trade, there was a draft bill which read as follows:

(b) Notstanding [sic] the amendment made by subsection (a)—

(1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and

(2) any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances.

Congressman Bingham, Chairman of the Subcommittee, raised a question about the subsection (2), stating that:

> It seems to me that if the President has not up to now used some authority that he has under 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to expand what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date, and that should be ample authority. I think on this point we would be particularly anxious to have the administration's reaction.

Hearings Before The Subcommittee On International Economic Policy And Trade of the Committee On International Relations, House of Representatives, 95th Congress, First Session, June 8, 1977 at p. 167.

The Administration responded the next day in the person of Leonard E. Santos, Attorney Adviser, Office Of The General Counsel, Department of the Treasury, who stated that the Administration took the position that "all powers conferred are exercised and that there are no additional powers that could be exercised which are not already exercised." *Id.* at 188. Therefore, there was no need for inclusion of subsection (2) of the draft.

If the power is seen as the power to regulate travel-related transactions to Cuba, the fact that President Carter had, just a month before, exercised his authority to amend the Cuban Assets Control Regulations to permit more trav-

el to Cuba would be evidence that the power or authority to regulate travel to Cuba was already being exercised.

Therefore, I do not find that discussion between Congressman Cavanaugh and C. Fred Bergsten, Assistant Secretary for International Affairs, Department of the Treasury, as being at odds with this interpretation. *See Markup before the Committee On International Relations*, House of Representatives, 95th Congress, First Session, June 16, 1977 at p. 21-22. In responding affirmatively to the Congressman's questions, Mr. Bergsten's position was that the amendment would strictly limit and restrict the grandfathering of powers being exercised to those specific uses of powers being currently being exercised under 5(b) to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977 and would preclude the expansion by the President of the authorities which might be included in 5(b) but are not being employed as of June 1, 1977. Given the complete legislative history, I do not believe the term "uses of" suggested that the President had to exercise powers in the future in the exact manner he was exercising them on June 1, 1977, especially since it was the administration's position that all the powers conferred were being exercised on June 1, 1977.

I find support for this analysis in descriptions of the "grandfather" clause given in subsequent reports and statements as the amendment made its way through the legislative process after June 16th. For example, in Mr. Bergsten's testimony before the Senate Subcommittee on International Finance of the Committee on Banking, Housing, and Urban Affairs on September 8, 1977, he refers to the bill, which had already passed the House, as authorizing the President "...to continue to exercise Section 5(b) powers *invoked* as of July 1st of this year...". *Hearing before the Subcommittee on International Finance* of the Committee On Banking, Housing, And Urban Affairs, United States Senate, 95th Congress, First Section, p. 2.

Third, it is my view that the fact that President Carter amended the Cuban Assets Control Regulations in May, 1980 to deal with the Mariel boatlift is evidence that the regulations were not frozen as of July 1, 1977 by the

"grandfather" clause. In "interpreting" Section 515.201 (the general prohibition) so as to make clear that certain types of travel-related activities were prohibited by it, the President was exercising a power in a way different from the way it was exercised on June 1, 1977; in my view, the amendment promulgated in April 20, 1982 stands on no different a footing.

Fourth, it must be kept in mind that as a general proposition, "The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." *Zemel* v. *Rusk*, 381 U.S. at 11.

Lastly, the defendant claims that in order for the President to promulgate the amendments to the Cuban Assets Control Regulations on April 20, 1982 legally, he could not use the "grandfather" clause but rather would have had to employ the procedures set out in the International Economic Emergencies Act, 50 U.S.C., Section 1701 *et seq.* Thus, according to the defendants, he would have had to declare a *new specific national emergency*, submit a report to Congress justifying his actions, consult with Congress before invoking the Act, submit periodic reports to Congress, and Congress would have to meet within six months to consider a vote on a concurrent resolution to determine whether the emergency should be terminated. 50 U.S.C., Sections 1621, 1702, and 1703. If the defendants are correct, it seems to me that when the President imposed the new regulations on April 20, 1982 imposing greater restrictions on travel to Cuba, there would have been some protest from someone in Congress that the President was exceeding his powers under the "grandfather" clause and not consulting Congress as he is required to do under the International Economic Emergencies Act. Yet the defendants have not pointed to a single instance, nor have I been able to find any, where a member of Congress has protested the administration's action, despite the fact that the imposition of greater restrictions on travel to Cuba was publicized. This, in my view, is a strong indication that the President's action in amending the Cuban Assets Control Regualtions [sic] on April 20, 1982 was a proper exercise of the power granted by Congress in the "grandfather" clause.

was a proper exercise of the power granted by Congress in the "grandfather" clause.

As an afterword, it is to be noted that I have analyzed the main issue as I see it as to whether or not the plaintiffs have shown a probability that they will prevail on the merits. However, there is no question that an injunction in this case would affect the government's conduct of its foreign affairs. There is law to the effect that in such cases, the burden on the plaintiffs is more than showing a probability of success on the merits—rather, it has been said to be that the plaintiffs must make an extraordinarily strong showing to succeed. *Adams* v. *Vance*, 570 F.2d 950, 955 (D.C. Cir., 1977).

IMMEDIATE IRREPARABLE HARM

"Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. *Massachusetts Coalition Of Citizens With Disabilities et al.* v. *Civil Defense Agency And Office Of Emergency Preparedness Of The Commonwealth Of Massachusetts et al.*, 649 F.2d 71, 74 (1 Cir., 1981) citing *Parks* v. *Dunlop*, 517 F.2d 785 (5 Cir., 1975). In my opinion, none of the original plaintiffs has carried the burden of showing "immediate irreparable harm". As to some, any potential harm is not immediate. For example, plaintiff Howard does not seek to visit Cuba until December, 1982; plaintiff Turner seeks to visit Cuba "this winter." As to plaintiffs Wald and Lowe, other than convenience, there is no showing that it would be impossible for them to go to Cuba at a later time, perhaps during a semester or vacation break from teaching activities. The same is true for plaintiff Morales and even more so for the plaintiff Hageman, who also plans a trip to Cuba in 1983. It appears that plaintiff Bradley has been able to conduct the trip to Cuba by his students under the protection of Judge Mazzone's temporary restraining order. And a claim by the organizations who promote travel to Cuba that they will lose business in the interim is not a sufficient showing, especially since the tours are scheduled for September-December, 1982.

However, the intervening plaintiffs have, in my judgment, demonstrated immediate irreparable harm. According to the papers, a contract was signed in August, 1981, before the change in the regulations, providing for a guarantee that 800 tourists from Puerto Rico will attend the games scheduled for August 1-15, 1982 with the Puerto Rico Olympic Committee obligated to pay a guarantee of $90.00 plus a penalty (which depends on the days of notice given) for each tourist who does not appear. Thus, if the tourists are not permitted to go to the games, the Committee must pay at least $72,000 on their guarantee and may be liable for an additional $35,000 to $85,000 depending on how long notice of cancellation [sic] is delayed. Although it does not appear that any moneys have yet been paid to Cuba, in addition to the penalties, the Committee will have to refund the deposits made by the tourists, which have, in the interim, been used for "advertising, promotional and sports activities." Para. 10, Verified Intervening Complaint. In addition, unlike the original plaintiffs, delay will mean that they will not be able to see that which they are going to Cuba for—i.e., the games, which are being held just during the period August 1-15, 1982.

Thus, I find that the intervening plaintiffs have demonstrated immediate irreparable harm.

BALANCE OF HARM AS BETWEEN THE PLAINTIFFS AND THE DEFENDANTS, AND QUESTION OF THE PUBLIC INTEREST

The last two factors a Court must consider when determining whether or not to grant a preliminary injunction is the balance of harm as between the parties and the public interest. *Massachusetts Coalition Of Citizens With Disabilities et. al.* v. *Civil Defense Agency And Office Of Emergency Preparedness Of the Commonwealth Of Massachusetts, et. al., supra,* at 74 citing *Grimard* v. *Carlston,* 567 F.2d 1171, 1173 (1 Cir., 1978).

In my judgment, analyzing these two factors in this case leads to the conclusion that a preliminary injunction should not be entered. There is no question but that the amendments to the Cuban Assets Control Regulations were the result of a considered judgment by the executive branch on

a question of foreign policy—I do not believe that the plaintiffs would dispute that proposition, although they clearly do not approve of the policy. There can be little doubt that the grant of preliminary injunctive relief to the plaintiffs would significantly thwart the policy, which depends on its enforcement for its efficacy. And the harm to the government would be immediate. If the amendments to the regulations are upheld by the Courts after a hearing on the merits, the government will have been harmed by the thwarting of its considered policy which was effected pursuant to a valid grant of Congressional authority. As to the original plaintiffs, the harm to the government in granting them an injunction, in my view, is greater than the harm to them, which is neither immediate or irreparable. As to the intervening plaintiffs, although I find that they have demonstrated that they will suffer immediate irreparable harm, I do not see that as outweighing the harm to the government, not only on the basis of the thwarting of a considered judgment as to foreign policy but also in that a large sum of money will be transferred to Cuba if the tourists are allowed to go to Cuba, a transfer which the policy is specifically designed to prevent.

Lastly, unless the plaintiffs are able to show a strong showing that they are probably going to succeed on the merits, I view the public interest as being served by not enjoining the executive in a foreign policy matter until a decision on the merits of the controversy.

RECOMMENDATION

Accordingly, I RECOMMEND that the two Motions For A Preliminary Injunction be DENIED, for the reasons, in summary form, that (1) neither the original plaintiffs nor the intervening plaintiffs have shown a probability of success on the merits, (2) the original plaintiffs have not shown that they will suffer immediate irreparable harm, (3) in the circumstances of this case, the harm to the plaintiffs if an injunction is denied does not outweigh the harm to the government if an injunction is granted, and (4) absent a showing of probability of success on the merits and a showing of immediate irreparable harm, the public interest is not

served by enjoining the executive from enforcing regulations which represent a considered judgment with respect to foreign policy.

REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates for the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the findings, recommendations, or report to which objection is made and the basis for such objection. Failure to comply with this rule might preclude further appellate review. *See Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1 Cir. 1980); *United States* v. *Pablo Escaboza Vega*, No. 81-1467 (1 Cir. May 24, 1982).

/S/ Robert B. Collings

ROBERT B. COLLINGS
United States Magistrate

JULY 16, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-1690-T

RUTH WALD, MARIAN LOWE, ROSARIO MARALES, FRANCIS E. BRADLEY, REV. ALICE HAGEMAN, CUBA RESOURCES GROUP, ROBERT C. HOWARD, CENTER FOR CUBAN STUDIES, LINDA TURNER, PLAINTIFFS,

v.

DONALD REGAN, SECRETARY OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY OF THE TREASURY, DENNIS M. O'CONNELL, DIRECTOR OFFICE OF FOREIGN ASSETS CONTROL, GEORGE SHULTZ, SECRETARY OF STATE, AND RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, DEFENDANTS,

PUERTO RICO OLYMPIC COMMITTEE AND RAFAEL MORALES CUBANES, ON HIS OWN BEHALF AND ON BEHALF OF THE ASOCIACION DE TURISTAS OLIMPICOS DE PUERTO RICO (ATROPRICO), AND OTHER PUERTO RICO SPORTS FANS, INTERVENING PLAINTIFFS.

CORRECTION IN REPORT AND RECOMMENDATION

COLLINGS, U.S.M.

In the last paragraph on page 22 which continues on the top of p. 23 of the Report and Recommendation On Motions For Preliminary Injunction, issued this date, the words "defendant" and "defendants" appearing in the first, seventh (p. 22), fourteenth and twentieth lines (p. 23) should read "plaintiffs". This error has been corrected, and substite pages 22 and 23 are attached hereto.

/s/ Robert B. Collings
ROBERT B. COLLINGS
United States Magistrate

JULY 16, 1982.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil No. 82-1690-T

RUTH WALD, ET AL., PLAINTIFFS,

v.

DONALD REGAN, ET AL., DEFENDANTS.

TEMPORARY RESTRAINING ORDER

On consideration of plaintiff Francis E. Bradley's motion for a temporary restraining order, the accompanying papers and defendants' opposition thereto, it is hereby

ORDERED, that defendants, their servants, agents and employees are hereby temporarily restrained from interfering in any way, including by threats or subsequent punishment, with a trip to Cuba Mr. Bradley is scheduled to lead on or about July 9, 1982, for up to fourteen high school students from various Friends' schools, pending a further hearing on a motion for preliminary injunction.

/s/ P. David Mazzone
P. DAVID MAZZONE
United States District Judge

Date: JUNE 25, 1982 3:30 PM

APPENDIX H

STATUTES AND REGULATIONS INVOLVED

Prior to its amendment in 1977, Section 5(b)(1) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b)(1), provided:

During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in

the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

Section 101(b) and (c) of Pub. L. No. 95-223, 91 Stat. 1625, provide:

> (b) Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.
>
> (c) The termination and extension provisions of subsection (b) of this section supersede the provisions of section 101(a) and of title II of the National Emergencies Act to the extent that the provisions of subsection

(b) of this section are inconsistent with those provisions.

Section 515.201 of the Cuban Assets Control Regulations, 31 C.F.R . 515.201, provides:

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including without limitation, transfers, withdrawals, or exportations of, any proper-

ty or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose of which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

The present version of Section 515.560 of the Cuban Assets Control Regulations, 31 C.F.R. 515.560, provides:

Certain transactions incident to travel to and within Cuba.

(a)(1) *General license.* The transactions in paragraph (c) of this section are authorized in connection with travel to Cuba by:

(i) Persons who are officials of the United States Government or of any foreign government, or of any intergovernmental organization of which the United States is a member, and who are traveling on official business; (ii) persons who are traveling for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities; or (iii) persons, and persons traveling with them who share a common dwelling as a family with them, who are traveling to visit close relatives in Cuba.

(2) For purposes of this section, the term "close relative" means spouse, child, grandchild, parent, grandparent, great grandparent, uncle, aunt, brother, sister, nephew, niece, first cousin, or spouse, widow, or widower of any of the foregoing. The term "close relative" also means mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, or brother-in-law.

(3) The general license contained in this section does not authorize transactions in connection with tourist travel to Cuba, nor does it authorize transactions in connection with business travel undertaken for any purposes other than those set forth in paragraph (a)(1) of this section.

(b) *Specific Licenses.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities.

(c) The following transactions are authorized in connection with travel to and within Cuba by persons licensed under paragraphs (a) and (b) of this section:

(1) All transportation-related transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person. This authorization may be used only once in every six consecutive months. Single copies of publications do not count against the $100 limit set forth in this subparagraph. For purposes of this section, the term "publications" includes books, newspapers, magazines, films, phonograph records, tapes, photographs, microfilm, microfiche, posters, and similar materials. All merchandise and publications obtained pursuant to this subparagraph shall be for noncommercial use only and shall not be resold.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons to, from or within Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points

outside the United States; chartering an aircraft or vessel; arranging hotel accommodations, ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions concerning aircraft or vessels incidental to their nonscheduled flights or voyages to, from, or within Cuba. This subparagraph does not authorize the carriage of any merchandise to and from Cuba, except accompanied baggage and merchandise, including publications, authorized by paragraph (c)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(d)(1) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as credit card issuers or intermediary banks, of credit card instruments (e.g., vouchers, drafts, or sales receipts) for expenditures in Cuba, and does not authorize a domestic credit card issue, or a foreign credit card firm owned or controlled by U.S. persons, to deal with a Cuban enterprise or with a third-country party, such as a franchisee, in connection with the extension of credit to any person in Cuba.

(2) Persons subject to U.S. jurisdiction are hereby authorized to process and pay credit card instruments for expenditures in Cuba where such instruments are dated prior to May 15, 1982. The authorization contained in this subparagraph shall expire at the close of business on July 15, 1982.

(e) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such publications, as defined in paragraph (c)(3) of this section, as are directly related to their professional ac-

tivities, without limitation as to value. Such merchandise may be acquired and imported only for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(f) Persons who travel in Cuba pursuant to provisions of this section shall not become nationals of Cuba solely because of such travel. This paragraph does not authorize any transaction prohibited by any other section of this part.

(g) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba, except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as expressly authorized in this section.

(h) *Professional research and similar activities.* (1) Paragraph (a)(1) of this section provides a general authorization for travel to, from, and within Cuba for professional research. Those covered by the "professional research" authorization are full-time professionals who travel to Cuba to do research in their professional areas, whose research is specifically related to Cuba and will constitute a full work schedule in Cuba, and where there is a substantial likelihood of dissemination of the product of such research. No transactions related to tourist or recreational travel within Cuba are authorized under the general license for professional research, except those that are consistent with a full schedule of research activities.

(2) "Similar activities" include attendance by professionals with an established interest in Cuba at professional meetings where research on Cuba is shared, and travel for research purposes specifically related to Cuba by persons who are working to qualify themselves academically as professionals (*e.g.*, certain graduate degree candidates). Study visits to Cuba in connection with pre-college or undergraduate college course work are not within the scope of professional

research and similar activities authorized by the general license.

(3) Categories of travel which do not qualify as professional research or similar activities and for which specific license requests will normally be denied include recreational travel; tourist travel; travel in pursuit of a hobby; general study tours; general orientation visits; student class field trips; youth camps; research for personal satisfaction only; travel by fishing or bird-watching groups and similar affinity groups; and any travel for an authorized research purpose, if the schedule of activities includes free time, travel, or recreation in excess of that consistent with a full work schedule of professional research and similar activities.

(4) A group does not fall within the general license for professional research or similar activities merely because some members of the group could qualify individually under the general license. For example, the presence of a professional fish biologist who travels to Cuba to engage in professional research does not bring within the general license other persons who might travel with the fish biologist but whose principal purpose in travel is to engage in recreational or trophy fishing. The fact that such persons may engage in certain activities with, or under the direction of, the professional fish biologist, such as measuring or recording facts about their catch, does not bring these individuals' activities within the meaning of professional research or similar activities.

(5) A person does not fall within the general license for professional research or similar activities merely because that person is a professional who plans to travel to Cuba. For example, a professor of history interested in traveling to Cuba for the principal purpose of learning or practicing Spanish or attending general lectures devoted to Cuban culture and contemporary life would not fall within the general license. A doctoral candidate in economics traveling to Cuba to undertake research for a dissertation on the Cuban economy

would fall within the general license for activities directly related to the research but would not be authorized by the general license to stay an extra week in Cuba in order to attend a seminar on Cuban arts and crafts.

(i) *Professional Meetings, Seminars, Conferences.* Specific licenses authorizing the transactions in paragraph (c) of this section will be issued in appropriate cases to persons desiring to travel to Cuba for purposes of participation in professional meetings, seminars, conferences, or similar gatherings, provided that the prospective traveler is a full-time professional in the field to which the meeting or similar gathering pertains; that planning and preparation for the meeting or similar gathering were underway prior to May 15, 1982; and that the meeting or similar gathering is scheduled to be held prior to December 31, 1982. Specific license requests pertaining to travel for attendance at professional meetings to be held after December 31, 1982, will generally be denied.

(j) For purposes of this section, all necessary transactions involving fully sponsored or hosted travel to, from, and within Cuba are authorized, provided that no person subject to U.S. jurisdiction shall make any payment or transfer of any property or provision of any service to Cuba or a Cuban national in connection with such travel. Travel shall be considered fully sponsored or hosted for purposes of this section notwithstanding a payment by a person subject to U.S. jurisdiction for transportation to and from Cuba, provided that the carrier furnishing the transportation is not a Cuban national.

The version of Section 515.560 of the Cuban Assets Control Regulations in effect from March 1977 through May 1982, 31 C.F.R. 515.560 (1977), provided:

Certain transactions incident to travel to and in Cuba.

(a) The following transactions are authorized:

(1) All transactions ordinarily incident to travel to and from Cuba.

(2) All transactions ordinarily incident to travel in Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there.

(3) The purchase in Cuba, and importation as accompanied baggage, of merchandise with a foreign market value not to exceed $100 per person, for personal use only. Such merchandise may not be resold. The authorization in this subparagraph may only be used once in every six consecutive months.

(4) All transactions by any person incident to arranging or assisting travel by any other person or group of persons, to, from, or in Cuba. This authorization includes arranging through transportation to Cuba; selling passage aboard a foreign carrier providing regularly scheduled service to Cuba from points outside the United States; chartering an aircraft or vessel; arranging hotel accommodations in Cuba; ground transportation, local tours and similar travel activities in Cuba; transfer of funds to Cuba or any national thereof; and receipt from Cuba or a national thereof of consideration for authorized services.

(5) All transactions on behalf of aircraft or vessels incidental to nonscheduled flights or voyages to, from, and in Cuba. This paragraph does not authorize the carriage of any merchandise to and from Cuba except accompanied baggage and merchandise authorized by paragraph (a)(3) of this section.

(6) All transactions incident to the processing and payment of checks, drafts, traveler's checks, and similar instruments negotiated in Cuba by any person under the authority of this section.

(7) Processing and payment by United States credit card issuers of credit card instruments (vouchers, drafts, or sales receipts) for authorized expenditures in Cuba forwarded by credit card companies in third countries to the domestic issuer for payment or reimbursement. Foreign credit card firms owned or controlled by U.S. persons are authorized to contract with a Cuban enterprise for the extension of credit through

the use of credit cards. However, this paragraph does not authorize a domestic credit card issuer to contract with a Cuban enterprise for the extension of credit to any traveler for any purpose.

(b) Persons who travel to Cuba for the purpose of gathering news, making news or documentary films, engaging in professional research or for similar activities are authorized to acquire and import into the United States, as accompanied baggage or otherwise, such photographs, films, books, magazines, newspapers, and similar publications as are directly related to their professional activities, without limitation as to value. Such merchandise may only be acquired and imported for their own professional use or that of their employers at the time of the travel, and may not be sold to other persons.

(c) Persons who travel in Cuba after March 18, 1977, and who prior to that date were not designated nationals of Cuba are licensed as unblocked nationals. This subparagraph does not authorize any transaction prohibited by any other section of this part.

(d) This section does not authorize any person subject to the jurisdiction of the United States to make any investment in Cuba, establish any branch or agency in Cuba, or transfer any property to Cuba except transfers by or on behalf of individual or group travelers, and aircraft or vessels, as authorized in this section.